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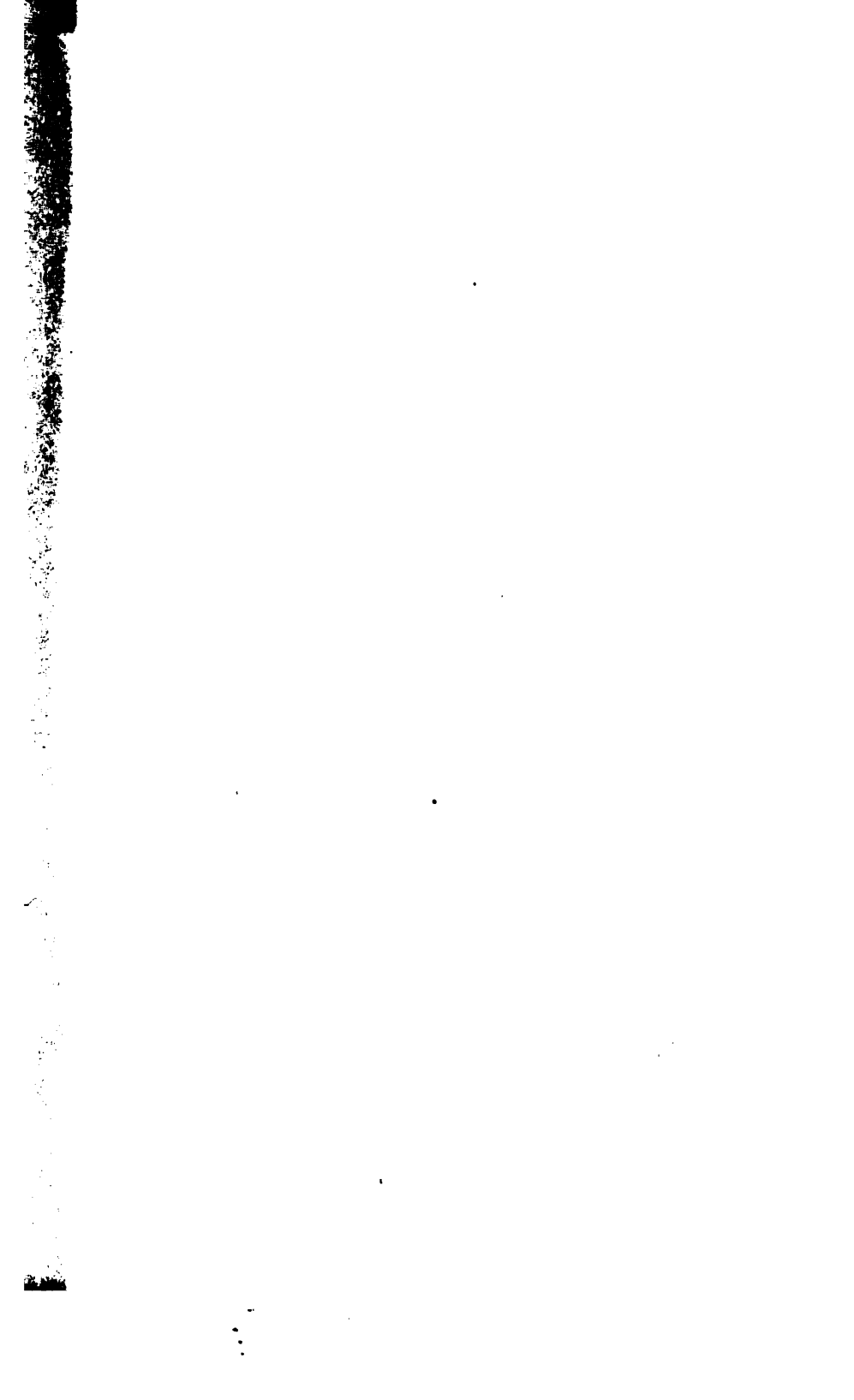
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CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
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DECIDED IN THE

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OF THE SEVERAL STATES.

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AMERICAN STATE REPORTS.

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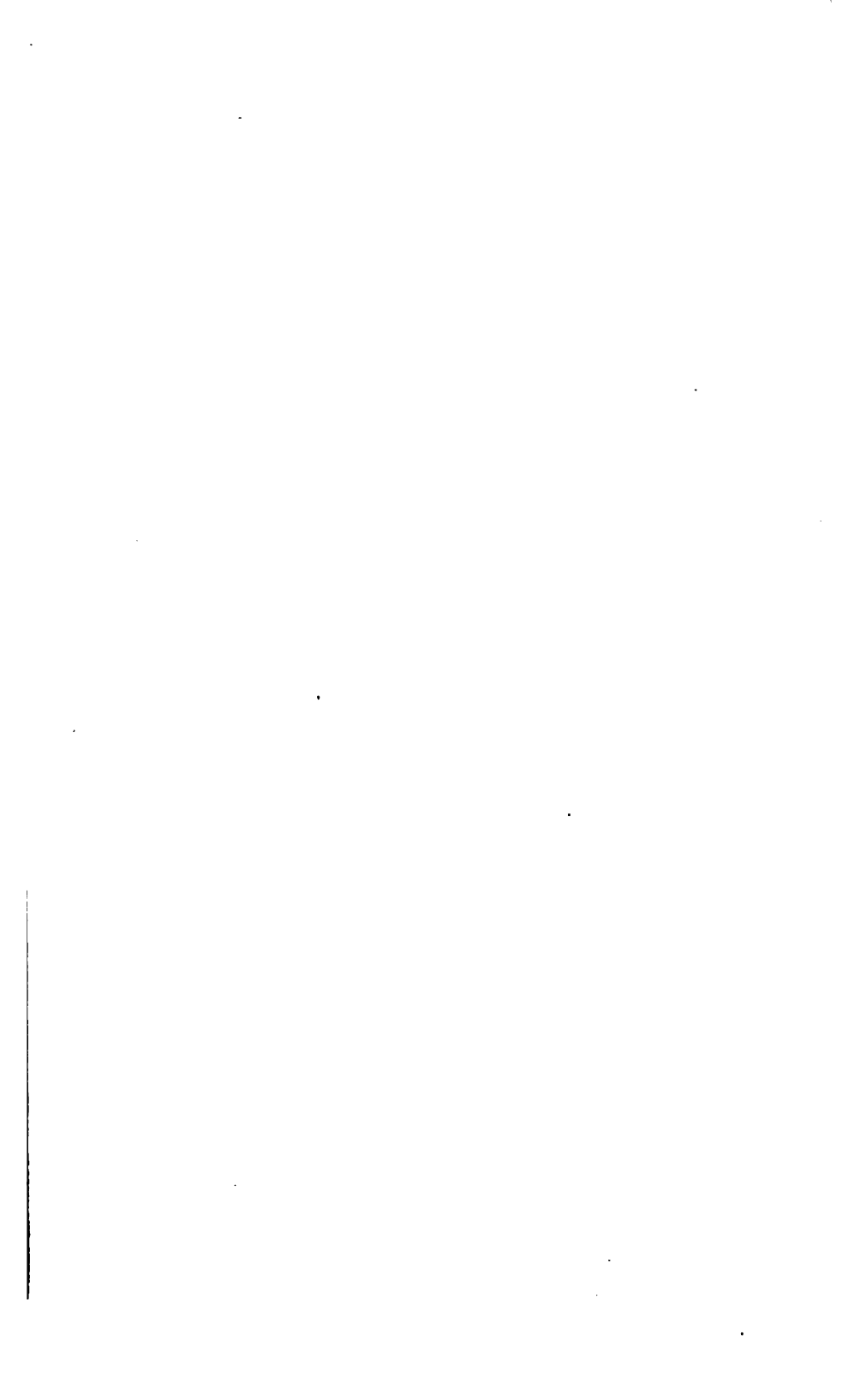
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CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

RUGG v. LEMLEY.

[78 Ark. 65, 93 S. W. 570.]

PARTY-WALLS—Charge on Land.—An agreement by an adjacent lot owner to pay part of the cost of a party-wall when he commences to use it creates a charge in the nature of an equitable lien upon his part of the lot on which the wall is erected, which is enforceable in equity. (p. 19.)

EQUITY JURISDICTION.—Effect of Prayer.—The statement of facts in a complaint in equity, and not the prayer for relief, constitutes the cause of action, which confers jurisdiction. (p. 20.)

PARTY-WALLS—Covenant Running With Land.—An agreement of an adjoining owner to pay for the use of a party-wall is a covenant running with the land, and the right to recover the sum agreed upon passes to the grantees of the original builder under his deed. (p. 20.)

Wood & Henderson and M. S. Cobb, for the appellants.

Greaves & Martin, for the appellee.

⁶⁶ **McCULLOCH, J.** The plaintiffs, B. L. Lemley and M. F. Work, are the owners of lot 27 in block 89 in the city of Hot Springs, on which is situated a two-story brick building, the center of the south wall of the building being on the line between lots 47 and 48. Lot 48 is owned by D. C. Rugg, who leased the same to defendant Ed Spear. This suit was brought in chancery by the plaintiffs, Lemley and Work, against defendants Spear and Ledwidge (a building contractor) to enjoin them from using the south wall of plaintiff's building as a party-wall in the construction of a new building on lot 48. It is alleged in the complaint that the wall is wholly upon lot 47, and is the property of plaintiffs, and that the defendants are proceeding, without right, to cut into the wall for the purpose of join-

ing the new building to it. A temporary restraining order was issued as prayed for, but the same was subsequently dissolved when it was shown that the wall was a party-wall on the line between lots 47 and 48.

On motion of defendant Spear, his lessor, D. C. Rugg, the owner of lot 48, was made a defendant in the cause.

After the dissolution of the temporary restraining order, the plaintiffs filed an amendment to their complaint, praying that if the court should determine that the wall described in the complaint is a party-wall, and equally on lots 47 and 48, the plaintiffs recover of defendant Rugg one-half of the original cost of the wall.

After the dissolution of the injunction, Alma B. Womack, the widow of J. P. Warren, deceased, filed her intervention in the cause, in which she alleges that said Warren in his lifetime was the owner of lot 47; that while such owner, by agreement between himself and D. C. Rugg, he erected upon the division line between lots 47 and 48 a brick wall (the wall in question); that at the time of the erection of said wall the portion ⁶⁷ of said lot 48 on which said wall was built was placed in the possession of said J. P. Warren, with the agreement and understanding by the owner of said lot 48 that whenever the wall was used by the owner of said lot 48, Warren should be paid one-half the price or value thereof; that said agreement was oral; that said wall then became the personal property of said Warren; that Warren subsequently died, leaving the intervener, his widow, and also leaving a will, by and in which he bequeathed to the intervener all his personal property; that by virtue of said will the said wall, and the agreement with reference thereto, became the personal property of the intervener; that the wall is of the value of five hundred and fifty dollars; that recently D. C. Rugg, who is now the owner of said lot 48, by an agreement with the defendant Spear, as his tenant, has made use of the wall, by attaching thereto the sleepers and joists of the house that Spear is erecting on said lot 48, by virtue of all of which she alleges that D. C. Rugg is indebted to her in the sum of the value of said wall.

Defendant Rugg filed demurrers to the intervention of Mrs. Womack and the complaint of the plaintiffs, which were both overruled by the court, and he then filed his an-

swer, in which he denied specifically all the material allegations contained in said interplea.

Rugg also filed his motion to transfer to the law court, which was overruled. Upon final hearing, the chancellor rendered a decree in favor of the plaintiffs, Lemley and Work, against defendant Rugg for the recovery of the sum of four hundred and seventy-five dollars, with interest, one-half of the cost of the wall, and "that, upon the payment of the judgment aforesaid by D. C. Rugg, . . . his heirs and assigns, shall hold, have and enjoy the easement of the party-wall situate on part of said lot 47 owned by the plaintiffs herein for the life of said wall; also to include that part of said wall on said lot 47, but in common with plaintiffs, their heirs and assigns, as to that strip of land actually covered by said party-wall as well as the wall itself appurtenant to both lots."

The intervention of Mrs. Womack was dismissed for want of equity. Rugg and Mrs. Womack appealed to this court.

⁶⁸ There are two questions of law presented: 1. Whether the court had jurisdiction to hear and determine the cause of action against appellant Rugg for the recovery of half the cost of the wall; and 2. Which of the two claimants should recover the same, Mrs. Womack, the widow and legatee of J. P. Warren, the original owner of lot 47 and builder of the wall, or Lemley and Work, the grantees of Warren under deed conveying lot 47 "with all appurtenances thereunto belonging."

The proof failed to sustain the cause of action stated in the original complaint, and the court denied the relief prayed. The ⁶⁹ amendment to the complaint, filed after the dissolution of the injunction, stated a different cause of action and one inconsistent with the facts stated in the original complaint, but one which was cognizable in equity. The agreement of Rugg to pay part of the cost of the wall, when he commenced use of the wall, became a charge in the nature of an equitable lien upon the lot on which the wall was erected, and was enforceable in equity: Washburn on Easements and Servitudes, 612; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Nelson v. McEwen, 35 Ill. App. 100; Roche v. Ullman, 104 Ill. 11; Keating v. Korf-hage, 88 Mo. 524; Burr v. Lamaster, 30 Neb. 688, 27 Am.

St. Rep. 428, 46 N. W. 1015, 9 L. R. A. 637; First Nat. Bank v. Security Bank, 61 Minn. 25, 62 N. W. 264.

The fact that only a personal judgment against Rugg was prayed for and granted did not prevent the court from assuming jurisdiction. The statement of facts in the complaint, and not the prayer for relief, constituted the cause of action which conferred jurisdiction upon the court: *Sannoner v. Jacobson*, 47 Ark. 31, 14 S. W. 458; *Waterman v. Irby*, 76 Ark. 551, 89 S. W. 884.

The more serious question in the case is whether the agreement concerning the payment for use of the party-wall is a covenant which runs with the land and the right to recover the agreed sum passes to the grantee of the original builder, under his deed to the lot, or whether it is the personal asset of the covenantee which passes to his assignee or personal representative.

Upon this question the authorities are inharmonious, but we incline to the view that the chancellor was correct in adopting the line of authorities which hold that such an agreement is a covenant which runs with the land and passes to the grantee of the original builder's lot: *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *Maine v. Cumston*, 98 Mass. 317; *Tomblin v. Fish*, 18 Ill. App. 439; *McChesney v. Davis*, 86 Ill. App. 380; *Platt v. Eggleston*, 20 Ohio St. 414; *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810; *Kimm v. Griffin*, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634.

Under the contract, when the wall was built, the builder became the sole owner thereof, with an easement over the strip of the adjoining lot built upon, subject to the right of the owner of the adjoining lot to use the wall upon payment of half the cost thereof. The whole wall, together with the easement over the adjoining lot, passed under the deed executed by the builder as ⁷⁰ an appurtenance to his lot: *McChesney v. Davis*, 86 Ill. App. 380; *Kimm v. Griffin*, 67 Minn. 25, 64 Am. St. Rep. 385, 69 N. W. 634.

The owner of the adjoining lot, by paying half of the cost of the wall in accordance with the terms of the contract, not only obtained title to that part of the wall which was built upon his lot, but he also acquired an easement over the other lot for support of the wall. These consummated rights he obtained, not from the builder, the original owner

of the lot, but through and from the person who was the owner of the lot at the time he used the wall and paid the agreed price. Though the rights of the parties were fixed by the original contract, yet the enjoyment of them was consummated only when the agreed price should be paid. Therefore, in contemplation of law, these rights were obtained through and from the present owner of the lot and wall, and he alone is entitled to the compensation.

As is well stated by the supreme court of Illinois in the case of *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282: "In all such cases (that is, where the title to the wall is in the builder) the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing, by every conveyance of it, until a severance of the half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass, in those cases until the payment is made; and so necessarily it is, constructively, a sale by the assignee of so much of the wall."

The contrary view is taken by the Nebraska court, and the question is discussed with much learning and ability by that court in the recent case of *Cook v. Paul* (Neb.), 66 L. R. A. 673, where all the authorities supporting that view are cited, but we are unable to agree with the conclusion there reached.

The decree of the chancellor is therefore affirmed.

Party-wall.—*An Agreement Between Adjoining* owners to pay for the building of a party-wall is generally regarded as a covenant running with the land: See *Southworth v. Perring*, 71 Kan. 755, 114 Am. St. Rep. 527, notes to *Dunscomb v. Randolph*, 89 Am. St. Rep. 941; *Geiszler v. De Graaf*, 82 Am. St. Rep. 679.

REEDER v. MEREDITH.

[78 Ark. 111, 93 S. W. 558.]

EXECUTORS AND ADMINISTRATORS.—An Administrator is a Trustee for all who are interested in the estate which he has in charge. (p. 23.)

TRUSTEES—Purchase by.—Although, as a general rule, a trustee cannot buy from the beneficiary, yet an exception exists when there is a distinct and clear contract executed after a jealous and scrupulous examination of all the circumstances and proof that the beneficiary intended the trustee to buy, and there is a fair consideration, no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in his character as such. (p. 23.)

TRUSTEES—Purchase by—Burden of Proof.—A trustee who purchases property from his beneficiary has the burden of proof to show the utmost good faith in the transaction. (p. 25.)

DEEDS—Voidable in Part.—A contract of conveyance, if voidable in part, is voidable as to all, as there can be no apportionment thereof. (p. 25.)

EXECUTORS AND ADMINISTRATORS—Purchase by—Improvements.—An administrator who purchases the lands of the estate in bad faith is not entitled to any compensation for improvements placed thereon. (p. 26.)

EXECUTORS AND ADMINISTRATORS—Purchase by—Return of Consideration Received.—If an administrator purchases the interest of an heir in the estate in bad faith, and is sued by him to enforce a trust as to part of the property, the heir need not return the consideration received, if the administrator has realized from part of the property more than he paid for all of it. (p. 26.)

EXECUTORS AND ADMINISTRATORS—Purchase by—Accounting.—If an administrator purchases the interest of an heir in the estate and is sued by him to enforce a trust as to part of the property purchased, he is not entitled, in such suit, to an accounting by the administrator of his profits on the part of the interest of such heir not involved in the suit. (p. 26.)

D. B. Sain and W. C. Rogers, for the appellant.

Feazel & Bishop, for the appellees.

¹¹⁴ WOOD, J. 1. At the time appellant purchased the land from his sisters, he was administrator of his father's estate, and as such had possession and control of the land for the payment of the debt of the estate for which it appears the lands were needed: Kirby's Digest, sec. 79. Appellant, therefore, was trustee for the creditors to see that their claims were paid. He was also trustee for the heirs to see that the lands were properly administered in the payment of the debts, and that the residue of the proceeds of the lands sold for the purpose of paying the debts should

be distributed to them according to their respective interests. Appellant was a trustee for all who were interested in the estate which he had in charge to administer: *Wright v. Campbell*, 27 Ark. 637; 1 *Woerner on Administration*, sec. 10; 2 *Woerner on Administration*, sec. 489.

The general rule, says Mr. Perry, is "that the trustee shall not take beneficially by gift or purchase from the cestui que trust; . . . the question is not whether or not there is fraud in fact; the law stamps the purchase by the trustee as fraudulent per se, to remove all temptation to collusion and prevent the necessity of intricate inquiries, in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit." "But," he continues, "there are exceptions to the rule, and a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the ¹¹⁵ circumstances; that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion. . . . Any withholding of information, or ignorance of the facts or of his rights on the part of the cestui que trust, or any inadequacy of price, will make such purchaser a constructive trustee": *Perry on Trusts*, sec. 195. This is the general doctrine announced by our own court and recognized by practically all the authorities: See *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720; *Cook v. Martin*, 75 Ark. 40, 87 S. W. 625, 1024; *Cornish v. Johns*, 74 Ark. 231, 85 S. W. 764. As to the purchase of trust property by the trustee, see, also, *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; *White v. Ward*, 26 Ark. 445; *Imboden v. Hunter*, 23 Ark. 622, 79 Am. Dec. 116, where the general rule is declared. See, also, 28 *American and English Encyclopedia of Law*, second edition, pages 1016, 1020, where the rule and exception thereto are stated, and the numerous authorities, English and American, are cited; 2 *Woerner on Administration*, sec. 487 et seq.

In *Handlin v. Davis*, 81 Ky. 34, it is said: "An administrator or executor is not allowed to purchase or speculate upon the estate confided to him for the purposes of administration."

In all cases the burden is on the trustee to establish all the requirements necessary to bring his title within the exception to the rule: 28 Am. & Eng. Ency. of Law, 2d ed., 1023.

In *Coles v. Trecothick*, 9 Ves. Jr. 234, Lord Eldon said: "Upon the question as to a purchase by a trustee from the cestui que trust I agree, the cestui que trust may deal with his trustee, so that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence, so much so that it is very hazardous for a trustee to engage in such a transaction." And further on in the opinion, after stating the requirements to bring a case within the exception upholding such transactions, he says: "I admit, it is a difficult case to make out, wherever it is contended the exception prevails."

The chancellor found: "That defendant, W. S. Reeder, was the acting administrator of the said estate; that prior to the purchase by him he submitted to the respective plaintiffs an offer, on ¹¹⁶behalf of his mother, for two hundred and twenty-five dollars for the undivided one-eighth interest she had in her father's estate; that at the time of the submission of the said offer defendant stated to plaintiffs that after the debts of the estate had been paid that would be their respective shares, and that his mother requested him to purchase it in order to hold the estate together until her death, when it would go back to all the children; that defendant further represented to plaintiff that that part of the lands allotted as dower and homestead was not to be taken into consideration in arriving at the extent of plaintiff's interest, and that he was not purchasing that interest at all; that plaintiffs, relying on these declarations, executed the deeds in controversy; that the value of the homestead and dower land was four thousand five hundred dollars, and that the value of the other lands was three thousand five hundred dollars; that the two hundred and twenty-five dollars received by plaintiffs for their respective interests was not an adequate price therefor." It could

serve no useful purpose to review at length the testimony upon which the chancellor's findings were based. It suffices to say that, eliminating all incompetent and irrelevant testimony, we are of the opinion that his conclusions of fact were not clearly against the weight of the evidence. Applying the principles of law announced, *supra*, to these facts, the conclusion reached by the lower court "that the defendant (appellant here) by reason of his relation of trustee for the creditors, the heirs and next of kin, was incapable of dealing with the trust property to his advantage" was clearly correct.

But, aside from any trust relationship, appellant was enjoined to the utmost good faith in dealing with his sisters. The dependence upon and confidence in him to do the right, engendered by the natural love and affection incident to such close blood kin, made *uberrimam fidem* imperative: *Million v. Taylor*, 38 Ark. 428.

2. The court did not err in canceling the deed from Annie Meredith to appellant, so far as it related to the south half of the northeast quarter, the northeast quarter of the northeast quarter, and the east half of the northwest quarter of section 19, and the northeast quarter of the southwest quarter of section 20, all in township 11 south, range 27 west. While this land had been assigned to the widow of Sam Reeder and the mother of appellant as homestead and dower, and was therefore not in the possession or under the control of the appellant as the administrator, still it was embraced in ¹¹⁷ the deed which conveyed the interest of appellee in the lands of the estate which were under the control of appellant as administrator, and which deed, as we have seen, was voidable. Now, the deed to all these lands was based upon one and the same consideration, and was an entire and indivisible transaction. The contract of conveyance was entire, and, being voidable in part, was voidable as to all. For there is no apportionment of such a contract: See *Phoenix Ins. Co. v. Public Parks Am. Co.*, 63 Ark. 187, 37 S. W. 959; *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179, 12 S. W. 498, 5 L. R. A. 744; *State v. Scoggin*, 10 Ark. 326; *Jackson v. Jones*, 22 Ark. 158; *Iron Mt. etc. R. Co. v. Stansell*, 43 Ark. 275. And, as to entire contracts, *Higgins v. Gager*, 65 Ark. 604, 47 S. W. 848.

3. The court did not err in refusing to allow appellant for alleged improvements. The testimony of appellant tends to show that what improvements he put upon the lands were under contract with his mother, she having possession and control at the time appellant claims the improvements were made, and that she paid appellant for these improvements in allowing him the use of the land for two years. Moreover, if appellant's purchase was in bad faith, as the court's findings show and the proof warrants, he would not be entitled to any compensation for improvements.

4. It was not necessary under the facts of this record for appellee to offer to return the two hundred and twenty-five dollars which appellant paid her for her interest in the land, before she could maintain her suit for a rescission of the contract. For the proof shows that appellant had realized from appellee's interest in the estate which he bought, apart from the reversionary interest in the dower and homestead, the sum of fifty-five dollars and twenty-five cents more than he paid. He is therefore in statu quo, with a clear profit of fifty-five dollars and twenty-five cents.

5. The claim of appellee that appellant should pay her the amount he received from the lands sold in excess of what he paid her for her interest is without equity, since the court annulled the sale of her reversionary interest in the dower and homestead. All the proof shows that she was willing to sell her interest in the estate, and would have sold it for the consideration paid her, had her dower and homestead not been included. There is nothing in the proof to impeach the good faith of the contract between appellant and appellee except the alleged misrepresentation on the part of appellant that the reversionary interest of appellee was ¹¹⁸ not to be included in the deed she should execute for her interest in the lands of the estate. But for this there would have been no cause for setting aside the deed.

The small profit realized would not show any inadequacy of consideration.

So our conclusion on the cross-appeal is that the court did not err in refusing appellee's claim for the fifty-five dollars and twenty-five cents.

The decree was right. Affirm.

The Purchase by an Executor or Administrator of his decedent's property may be voidable, but it is not void: See Mason v. Odum, 210 Ill. 471, 102 Am. St. Rep. 180, and cases cited in the cross-reference note thereto.

A Trustee is Incapacitated, as a rule, to purchase any interest in the trust property: Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486; Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503.

MARSHALL v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

[78 Ark. 213, 94 S. W. 56.]

EVIDENCE—Res Gestae.—If a railroad brakeman is mortally injured while in the discharge of his duty and lives only a short time thereafter, a statement by him as to how he received the injury is admissible in evidence as part of the *res gestae*. (p. 29.)

RAILROADS—Duty and Liability as to Disabled Cars.—A railroad company is bound only to exercise due care, through its vice-principals, and through a proper system of timely inspection, to discover disabled cars and notify its trainmen of such condition. When this is done, the risk of handling the cars and carrying them to the shop becomes one of the risks ordinarily incident to the employment assumed by such trainmen. (p. 30.)

RAILROADS—Disabled Cars—Risks Assumed by Trainmen.—If a car is reported to a railroad brakeman as being out of order or disabled, or is known to him to be in such condition, the burden of ascertaining the defect and source of danger is cast upon and is assumed by him. (p. 31.)

RAILROADS—Disabled Cars—Duty to Employé—Assumption of Risks.—Although a railway employé is engaged in the hazardous work of handling disabled cars, he does not assume risks created by the negligence of the railroad company in not exercising due care to protect him. (p. 32.)

RAILROADS—Disabled Cars—Assumption of Risk.—A railroad brakeman engaged in coupling a disabled car to be taken to a repair shop, with notice of its condition, assumes the risk of handling it. (p. 32.)

RAILROADS—Disabled Cars—Assumption of Risks.—A railroad employé whose duty it is to handle disabled cars, knowing that a certain car is disabled, assumes as one of the ordinary risks of his employment any injury resulting from the disabled condition of such car in the absence of negligence on the part of the railroad company. (p. 32.)

Marshall & Coffman and Trimble & Robinson, for the appellant.

O. L. Miles, for the appellee.

²¹⁵ McCULLOCH, J. Appellant, as administratrix of the estate of her deceased husband, C. R. Marshall, brought this action against appellee to recover damages by reason of his death, alleged to have been caused by the negligence of appellee. Deceased was a brakeman employed by appellee, and was killed by a train at Russellville, Arkansas, while he was coupling cars. Negligence of appellee was alleged in allowing the roadbed to become covered with piles of clinkers and cinders, and in allowing a drawhead and coupler on one of the cars which deceased was attempting to couple to become defective, and in allowing a hinge of an apron attached to the car to become broken, none of which defects, it is alleged, deceased had notice of. The answer denied all the allegations of negligence, and alleged contributory negligence on the part of deceased, and that his death resulted from an accident which was a part of the risk he assumed in his employment.

When the introduction of testimony was completed, the court instructed the jury to return a verdict for the defendant, which was done, and the plaintiff appealed. The only question, therefore, presented is whether there was sufficient testimony, giving it the strongest probative force in support of plaintiff's alleged cause of action, to justify a verdict in her favor.

It is shown that deceased made three or four attempts to couple the cars, which were ineffectual on account of the failure of the coupler to work automatically. He was killed in the last attempt. No defect in the coupler is shown to have existed, except that it was perhaps rusty, and the knuckle failed to open and close from the impact of the cars coming together. Immediately after the accident it worked all right after being greased. The car which he was attempting to couple onto the train was a disabled dirt car which had been in use in the work of reconstructing the roadbed. On the end of the car was an iron apron about three feet wide, extending the full width of the car, which was attached to the car by large iron hinges. The apron was arranged so that, when turned down in a horizontal position, it covered the space between that car and the next one, and enabled the plow to pass along unobstructed from car to car to expel the ²¹⁶ loads of dirt. One of the hinges on the apron was broken, and, when the apron was turned back, it protruded twelve inches, so one of the witnesses

stated, over the end of the car. Deceased, in attempting the last time to couple the cars, stepped out from between them, gave the signal to the engineer to back up, and walked back between the cars to adjust the knuckle of the coupler. He had his hand on the knuckle when the cars came together, and he attempted to jump out from between them, and was caught by the hinge, and fell between the ends of the couplings, and was hurt. The hinge either pierced his body or his clothing. He lived only a very short while, and when asked, after he partially revived from the shock, concerning the manner in which he received the injury, merely said, "The hinge." There was sufficient evidence to have justified the jury in finding that the company was guilty of negligence in allowing piles of clinkers and cinders to accumulate along the track which might hinder the trainmen in handling and coupling cars, but there was no testimony tending to show that this contributed to the injury of appellant's intestate. One witness stated that he was either "caught by something or stumbled," he did not pretend to know definitely which it was. Two eye-witnesses introduced by plaintiff stated that he was caught by something and was thrown over between the ends of the couplings. There can be no doubt, under the evidence, that he was caught by the hinge as he attempted to pass out from between the cars. This was his own brief account of the accident, which was stated under circumstances which rendered it admissible as part of the *res gestae*. So there was nothing to go to the jury on this charge of negligence.

The evidence was undisputed that the coupler was not in perfect working order, and that the hinge on the apron of the car was broken, either of which defects the jury might have found from the evidence contributed to the injury. There was also sufficient evidence to warrant a finding that the car had not been inspected and notice given in the usual way of the defects. But it does not follow from this that the servants of the company were negligent in this regard, or that the accident was not due to one of the risks which appellant's intestate assumed by virtue of his employment. On the contrary, it is clear from the evidence that he had notice that the car was ²¹⁷ disabled in some way, and that it was being coupled into the train for the purpose of carrying it to Van Buren for repairs. This train was made up

at Russellville for a trip to Van Buren, and the conductor had orders from the office of the trainmaster to take up all bad-order dirt cars and all empty boxcars on the road between Russellville and Van Buren, and convey them to Van Buren for repairs. Deceased knew of this order, and assisted in locating the bad-order dirt cars (there being two of them) on the sidetrack at Russellville. The conductor and one of the brakemen testified that deceased had the switch list containing the numbers of those cars, and that all three of them hunted up the cars and looked at them. In this way he received notice that they were disabled cars to be carried to the shop for repairs. It may be that he did not know of the projecting broken hinge before he was caught by it, though it is highly probable from the evidence that he did observe it. It was a defect easily discernible on casual observation of that end of the car, and the conductor testified that he and deceased examined the car together, and that the latter was bound to have seen it. But the company was not bound to give him specific notice of the defects. It was not customary to do so, and under the facts of this case it was not required in the exercise of due care. It was customary for the inspector merely to mark with chalk on the disabled car the letters "B. O.," meaning bad order. This was not done in this instance, and the jury would have been warranted in so finding, and that the inspector was guilty of negligence in failing so to do; but, as deceased received information of the same fact from another source, it cannot be said that the negligence of the inspector contributed to the injury. In the operation of railroad trains, cars will necessarily become disabled, sometimes from ordinary wear of use and sometimes from unavoidable accident. They must then be conveyed to the shop for repairs, and it is the duty of the trainmen to do this. It is necessarily and unavoidably a part of the duties arising from their employment as train operatives, because the company obviously cannot provide a repair shop wherever a car may become disabled, nor send out a special train and corps of men to bring in or repair every disabled car. It is only bound to exercise due care, through its vice-principals, ²¹⁸ and through a proper system of timely inspection, to discover the disabled cars and notify the trainmen of such condition. When this is done, the risk of handling the cars and carrying them to the shop becomes one of the

risks ordinarily incident to the employment, and is assumed by the employé: 1 Labatt on Master and Servant, sec. 268; Dresser on Employers' Liability, p. 409; 4 Thompson on Negligence, sec. 4729; Chesapeake etc. R. Co. v. Hennessy, 96 Fed. 713, 38 C. C. A. 307; Yeaton v. Boston etc. R. R., 135 Mass. 418; Judkins v. Maine Cent. R. Co., 80 Me. 417, 14 Atl. 735; Arnold v. Delaware etc. Co., 125 N. Y. 15, 25 N. E. 1064; Chicago etc. Ry. Co. v. Ward, 61 Ill. 130; Fraker v. St. Paul etc. Ry. Co., 32 Minn. 54, 19 N. W. 349; Kelly v. Chicago etc. Ry. Co., 35 Minn. 490, 29 N. W. 173; Flannagin v. Chicago etc. R. Co., 50 Wis. 462, 7 N. W. 337; Watson v. H. & T. C. Ry. Co., 58 Tex. 434; Brown v. Chicago etc. R. Co., 59 Kan. 70, 52 Pac. 65.

The doctrine applicable to the facts of this case is fully stated by the supreme court of Minnesota in Kelly v. Chicago etc. R. Co., 35 Minn. 490, 29 N. W. 173, as follows:

"The aspect of the case is, then, this: The plaintiff's intestate is notified generally that the car is in bad order, so that it has been necessary to withdraw it from ordinary service and lay it up for repairs. When he comes to handle it, he does so knowing that, for some reason not disclosed to him, it is not suitable for use in the ordinary way. Not knowing what, in particular, those reasons are, if he handles the car at all, he handles it as a car which is unsuitable for use, and at his own risk, not only for its defects—at least for such as are apparent to or would be fairly suggested by ordinary diligence and careful observation, like those of the brake on this car. . . . The plaintiff's intestate must be taken to have assumed the risk of handling this car as one in bad order, which it therefore might be dangerous to handle in the ordinary way, and as to which, in the absence of any definite information as to the respect in which it was defective, the burden of ascertaining the defects and source of danger was cast upon and assumed by him. As he took this risk and burden upon himself, he cannot hold the defendant responsible for it."

In Chesapeake etc. R. Co. v. Hennessy, 96 Fed. 713, 38 C. C. A. 307, Judge Lurton, speaking for the court, said: "The rule is well settled that if the work of the employé consists, in whole or in part, in dealing with damaged or defective cars, and which, by the very ²¹⁹ nature of his occupation, he must know, or have some reason to know, are unsafe and dangerous, he voluntarily assumes the risk

and hazards which are incident to the duty he was engaged to perform. It is not a case where dangerous or defective instrumentalities are supplied by the master to be used in his work, and where notice of such danger should be given, but a case where the instrumentalities to be handled and worked with or upon are understood to involve peril and to demand unusual care. In such cases, the risk is assumed by the servant as within the terms of his contract, and compensated by his wages."

We do not mean to hold that because the servant is engaged in the hazardous work of handling disabled cars he is deemed to have assumed risks created by the negligence of the company or its vice-principals, or that the company is absolved from the exercise of due care to protect him. On the contrary, we say that whilst he is engaged in that work, though he is deemed to have assumed all the ordinary risks incident to the performance of that particular duty, yet the same duty rests upon the company and its vice-principals to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, as while he is in the discharge of other and less hazardous work. The case of *St. Louis etc. Ry. Co. v. Touhey*, 67 Ark. 209, 77 Am. St. Rep. 109, 54 S. W. 577, is illustrative of the doctrine. In that case the servant was a member of a wrecking crew engaged in removing wrecked cars to the repair shops, and was injured by reason of the negligent acts of other employés of the company in moving the train to which the cars were attached at too rapid a speed. The court held that the company was liable for the negligence—that it was a risk which the servant had not assumed. But in the case at bar the servant knew that the car was disabled. It was a part of his duties to handle such cars, and, according to all the authorities on the subject, he must be deemed to have assumed, as one of the ordinary risks of his employment, the risk resulting from the disabled condition of the car.

This being true, the evidence did not justify a verdict in favor of the plaintiff, and the court properly instructed the jury to return a verdict for the defendant.

Affirmed.

Riddick, J., not participating.

The Liability of an Employer to his employé for injuries arising from defective machinery and appliances is considered in the note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289. It is the duty of a railroad company to provide and maintain reasonably safe and suitable cars and appliances for its employés to work with: Cincinnati etc. R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67; Mason v. Richmond etc. R. R. Co., 111 N. C. 482, 32 Am. St. Rep. 814; Eaton v. New York etc. R. R. Co., 163 N. Y. 391, 79 Am. St. Rep. 600. On the general doctrine of assumption of risks on the part of an employé, see the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884.

FRAZIER v. POINDEXTER.

[78 Ark. 241, 94 S. W. 464.]

AGENCY—Undisclosed Principal—Setoff.—If an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of the agency but supposed that the agent dealt for himself, such suit is subject to any defense or setoff acquired by a third person against the agent before he had notice of the principal's rights, and this rule applies not only to the sale of goods, but as well to other contracts where the agent is authorized to collect money for his undisclosed principal. (p. 36.)

AGENCY—Knowledge of Undisclosed Principal—Setoff.—If a person who deals with an agent, acting in his own name, knows, or has reason to believe, that he is dealing with an agent, though he does not know who the principal is, he cannot plead against such principal a defense or setoff which he has against the agent. (p. 36.)

AGENCY—Setoff.—If an agent accepts notes for collection under an agreement that he will pay the money, when collected, over a third person, he has no right to use it as a setoff on a demand due him from his principal, disclosed or undisclosed. (p. 37.)

Smead & Powell and Campbell & Stevenson, for the appellant.

242 McCULLOCH, J. This is an action brought by N. F. Frazier, appellant, against E. S. Poindexter, appellee, on account to recover money alleged to have been collected by the defendant upon certain promissory notes delivered to him by one J. W. Ferguson as agent of plaintiff.

Frazier lived at El Dorado, Kansas, and owned a lot of horses which he placed for sale in the hands of Ferguson, who was engaged in the business of buying and selling horses in Arkansas. Ferguson sold the horses for Frazier in Miller county, this state, taking notes for the purchase price in his own name. He delivered these notes to Frazier

who subsequently returned them to him (Ferguson) for collection. There is a conflict in the testimony concerning the indorsements on the notes. Frazier and Ferguson both testified that they were assigned to the former by written indorsements on the back of each note, whilst Poindexter testified that Ferguson indorsed them in blank.

Ferguson sent the notes for collection by mail to Poindexter, who was at the time an employé of Ferguson's on a stated salary, assisting him in buying and selling horses and cattle, making collections, etc. Ferguson testified that he directed Poindexter to remit the money when collected to Frazier. Poindexter testified that Ferguson instructed him to remit to Frazier any amount left in his hands after making expenditures directed by him (Ferguson). He collected five hundred and fifty-two dollars and seventy-five cents on the notes and remitted three hundred and twenty-five dollars to Frazier, promising to remit the balance soon, but subsequently he refused to pay the balance of two hundred and twenty-seven dollars and seventy-five cents to Frazier, upon the alleged ground that Ferguson owed him more than that amount on account, and claimed that he had collected the money for Ferguson under the belief that the notes belonged to the latter and without any information that Frazier owned the notes. He claimed in his testimony at the trial that he knew Frazier to be a banker at El Dorado, Kansas, and supposed that Ferguson directed the remittance to be made to him because he (Ferguson) was indebted to Frazier.

In his answer, Poindexter set forth the above as a defense and pleaded his account against Ferguson as a setoff. He also alleged that, under the belief that Ferguson owned the horses and notes, he expended large sums, by direction of Ferguson, ²⁴³ in feeding and taking care of the horses, and that he was directed to pay therefor out of the said funds collected.

A trial before a jury upon the issues thus presented resulted in a verdict for the defendant, and the plaintiff appealed.

Appellant asked the court to give the following instructions: "1. The court instructs the jury that if you find from the evidence in this case that the notes from which

the money was collected were made payable to J. W. Ferguson or order, and that the said J. W. Ferguson, for value, before they were due, transferred said notes to Frazier, and that said notes were received from Frazier for collection by Ferguson, and delivered to defendant, and he collected same, and failed to remit said money, then your verdict must be for plaintiff, for the amount he has received for Frazier and has not remitted."

But the court, over the objection of appellant, added to said instruction the following: "If the defendant knew Frazier was the owner of the notes, or was in possession of facts that would place a reasonable person on inquiry as to the ownership."

Appellant also asked the court to give the following instruction, which the court, over his objection, modified by inserting the words in italics: "3. The court instructs the jury that if you find from the evidence in this case that the notes were the property of the ²⁴⁴ plaintiff, and the defendant collected the same agreeing to remit the amount so collected to plaintiff, *and knowing the plaintiff to be the owner of the notes*, then your verdict should be for the plaintiff in the amount collected less amount remitted, though you may further find that the said Ferguson is or is not indebted to the said Poindexter."

The court refused to give the following instruction asked by appellant: "4. The court instructs the jury that J. W. Ferguson is not a party to this suit; and if you find from the evidence in this case that these notes were taken in the name of J. W. Ferguson, and by Ferguson transferred to the plaintiff by writing his name on the back of said notes for value, and by Frazier were delivered to Ferguson, and by him delivered to defendant for collection for account of Frazier, and the defendant accepted said notes for collection for plaintiff and collected same, then your verdict should be for the plaintiff in the amount collected, less amount remitted, though you may further find that the witness Ferguson is or is not indebted to the defendant."

The court erred in refusing the fourth instruction asked by appellant. That instruction contained a recital of facts which, if they were found to be true, were sufficient to put appellee upon notice that the notes belonged to appellant, and he could not under those circumstances claim a setoff

against the money collected thereon. It was undisputed, under the testimony, that the notes belonged to appellant. If, therefore, they were taken in the name of Ferguson, but transferred to appellant by written indorsement, and appellee accepted them for collection for appellant, he was bound to take notice of the latter's ownership, and account for the money collected. He could not apply it on a debt due him by Ferguson. This instruction was not covered by the first instruction asked by appellant and modified by the court. The latter did not embrace the facts stated in the former that the assignment of the notes was in writing, so that appellee was bound to take notice of it, nor that he accepted the notes for collection for appellant.

It is undoubtedly the law that where an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of an agency, but supposed ²⁴⁵ that the agent dealt for himself, such suit is subject to any defense or setoff acquired by the third party against the agent before he had notice of the principal's rights: 2 Clark & Skyles on Agency, sec. 537; Tiffany on Agency, p. 311; George v. Clagett, 7 Term Rep. 359; Rabone v. Williams, 7 Term Rep. 360; Belfield v. National Supply Co., 189 Pa. 189, 69 Am. St. Rep. 799, 42 Atl. 131; Sullivan v. Shailor, 70 Conn. 733, 40 Atl. 1054; Buchanan v. Cleveland Linseed Oil Co., 91 Fed. 88, 33 C. C. A. 351.

And this rule applies not only to sale of goods, but as well to other contracts where the agent is authorized to collect money for his undisclosed principal: Tiffany on Agency, p. 311; Montague v. Forward, [1893] 2 Q. B. 350.

But if the party who dealt with the agent, acting in his own name, knew, or had reason to believe, that he was dealing with one who was an agent for some third person, he cannot successfully plead such defense or setoff. He must, in order to be protected, be innocent of any knowledge or of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent. Where he knows that the party he is dealing with is an agent, although he does not know who the principal is, he is not protected: Quinn v. Sewell, 50 Ark. 380, 8 S. W. 382; Baxter v. Sherman, 73 Minn. 434, 72 Am. St. Rep. 631, 76 N. W. 211; Semenza v. Brinsley, 18 Com. B., N. S.,

467, 34 L. J. C. R. 161; 114 Eng. Com. L. 467; *George v. Clagett*, 7 Term Rep. 359; *Bliss v. Bliss*, 7 Bosw. 344.

The third instruction asked by appellant should have been given, and the court erred in modifying it. If the defendant accepted the notes for collection under an agreement that he would pay the money when collected over to plaintiff, he had no right to apply it to his own debt, and to refuse to pay it to plaintiff, even though he had no information of Ferguson's agency and believed that the notes belonged to Ferguson.

"The right of setoff, recoupment and counterclaim in actions at law between principal and agent is," says Mr. Mechem, "governed ordinarily by the same rules that apply in other cases. This right, however, may be waived by contract, express or implied, and it cannot be insisted upon where its enforcement would result in a violation of the agent's duty to his principal. The receipt of money by an agent to be applied to a specific purpose imposes upon him the duty not to apply it to another and different purpose. He cannot, therefore, apply it to his own use by using as a setoff against it a demand due him from his principal": 246 Mechem on Agency, sec. 535; 1 Clark & Skyles on Agency, sec. 427; *Tagg v. Bowman*, 108 Pa. 273, 56 Am. Rep. 204.

The same rule would undoubtedly apply where suit is brought by an undisclosed principal; for, if the defendant could not have claimed the right of setoff against his own principal, he could not do so against the undisclosed principal of an agent with whom he dealt as principal.

There was abundant evidence to base the instruction upon as asked by appellant. Ferguson testified that when he sent the notes to Poindexter for collection he instructed him to remit the amount collected to Frazier, and he was corroborated by Frazier, who testified that Poindexter, when he made the remittance of three hundred and twenty-five dollars, promised to send the balance in a short time. If the jury found these facts to be true, and that Ferguson did not recall that direction for the application of the funds, then the verdict should have been for the plaintiff.

The first instruction given at the request of appellee is objectionable, because it imposed upon appellant the bur-

den of showing that he had given notice to appellee of his rights, even though the jury found that there were circumstances sufficient to put him upon notice as to appellant's ownership of or interest in the notes, but this objection should have been specifically pointed out. A general objection to the instruction as a whole was not sufficient.

For the errors indicated, the judgment is reversed, and cause remanded for a new trial.

Suits by Undisclosed Principals on contracts made by their agents are considered in the note to *Powell v. Wade*, 55 Am. St. Rep. 915. An undisclosed principal runs the risk, as against those who deal with his agent as the real owner, of having his claim met by the set-off of a demand due from the agent: *Belfield v. National Supply Co.*, 189 Pa. 189, 69 Am. St. Rep. 799. See, however, *Baxter v. Sherman*, 73 Minn. 434, 72 Am. St. Rep. 631.

SWING v. ST. LOUIS REFRIGERATOR AND WOODEN GUTTER COMPANY.

[78 Ark. 246, 93 S. W. 978.]

JUDGMENTS, FOREIGN—Proof of, to Confer Jurisdiction.—

One claiming authority to sue as trustee under a foreign judgment, must, to maintain his suit, when the defendant denies the jurisdiction of the foreign court to appoint the plaintiff a trustee, not only produce the judgment appointing him, but also prove such pleadings and proceedings as empowered the court to render the judgment. (pp. 40, 41.)

JUDGMENTS—Jurisdiction.—A petition or complaint must be filed in the court whose action is sought, or the subject matter must be otherwise presented for its consideration in some mode sanctioned by law, in order to confer jurisdiction upon the court to render judgment. (p. 41.)

LIMITATION OF ACTIONS—Burden of Proof.—If the statute of limitations is set up as a defense, the burden is upon the plaintiff to prove that his action was brought within the time prescribed by such statute. (p. 41.)

Hardage & Wilson, J. W. & M. House and P. A. Reece, for the appellant.

J. H. Crawford, for the appellee.

248 **BATTLE, J.** James B. Swing, as trustee for the creditors and policy-holders of the Union Mutual Insurance Company, of Cincinnati, Ohio, in a complaint in an action

against the St. Louis Refrigerator and Wooden Gutter Company, alleged that the supreme court of Ohio, on December 18, 1890, disincorporated said insurance company, and afterward appointed plaintiff the trustee for the creditors and policy-holders of the insurance company, and he accepted the trust and qualified, and is acting as such trustee; that said insurance company was a mutual company, and was incorporated under the laws of Ohio on May 27, 1887; that section 3650 of the Revised Statutes of Ohio provides that "every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance, and shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note." Said mutual insurance company was doing business during the years 1889 and 1890. That the defendant accepted from the insurance company a policy of insurance on its property against loss by fire; that said policy was for four thousand dollars, and was in force from May 1, 1889, to May 1, 1890, the annual premium on it being ninety-six dollars; that the contingent liability to assessment of the defendant, under the by-laws of the company and the statutes of Ohio and the decree hereinafter mentioned, was and is five times the annual premium, to wit, four hundred and eight dollars; that by accepting and holding the policy the defendant effected insurance in the insurance company during the time and in the amount aforesaid, and became a member of the same, and is legally and equitably liable for its just proportion of all unpaid losses and expenses incurred by the insurance company ²⁴⁹ during the life of the policy and to pay such percentage on the amount of the contingent liability to assessment on the policy. That the supreme court of Ohio, on the eleventh day of June, 1901, assessed the rate of liability of the members and stockholders of the insurance company for the unpaid losses and expenses of the company; that plaintiff, on or about the sixth day of September, 1901, notified the defendant to pay said assessment, but it refused to do so, and is indebted to him as such trustee, on the assessment, in the sum of one hundred and sixteen dollars and seventy-seven cents,

with six per cent per annum interest thereon from 6th of September, 1901.

The defendant, the St. Louis Refrigerator and Wooden Gutter Company, answered and denied that the supreme court of Ohio disincorporated the insurance company and appointed plaintiff trustee as alleged, and made and entered a decree of assessment; and alleged that the supreme court of Ohio was without jurisdiction to appoint plaintiff trustee for the purposes alleged in the complaint; and pleaded the statute of limitation in bar of plaintiff's right to maintain this action.

In the trial of this action the following was shown to be a statute of Ohio: "Every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance, shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability; and the directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of such liability, and shall be paid to the officers of the company within thirty days next after the publication of such notice," etc.

The issuance of the policy, the date, the amount, the premium and the time it was in force were shown to be as alleged in the complaint.

What was said to be the judgment of the supreme court of Ohio, without any pleadings or other proceedings, was read as evidence.

²⁵⁰ The defendant recovered judgment, and plaintiff appealed.

The appellee having denied that the supreme court of Ohio had jurisdiction to appoint appellant trustee, the duty and the burden devolved upon him to show jurisdiction. He failed to do so. He produced what he called the judgment of the court appointing him trustee, but did not prove such pleadings and proceedings as authorized or empowered the court to render the judgment. "It is essential," says

Mr. Freeman, "that the jurisdiction of a court over a subject matter be called into action by some party and in some mode recognized by law. A court does not have power to render the judgment in favor of one as plaintiff if he has never commenced any action or proceeding calling for any action, nor has it, as a general rule, power to give judgment respecting a matter not submitted to it for decision, though such judgment is pronounced in an action involving other matters which have been submitted to it for decision, and over which it has jurisdiction. A petition or complaint must be filed in the court whose action is sought, or otherwise presented for its consideration in some mode sanctioned by law": 1 Freeman on Judgments, sec. 120, and cases cited.

Many illustrations might be given of this rule. A few will suffice. "The circuit courts of this state have jurisdiction to enforce the collection of debts according to an established procedure. A holds the bond of B for one thousand dollars, due and unpaid. He goes into a circuit court with the bond in his hand, and without writ issued or any pleadings, asks the court to award a rule against B to show cause why judgment should not be rendered against him for the debt and interest. The rule is accordingly awarded, executed and returned, and judgment thereupon rendered for the debt, interest and costs. Such a judgment would be void, notwithstanding the court has jurisdiction of the subject and of the parties. Why void? Because, in the language of Mr. Justice Field, 'the court is not authorized to exert its power in that way.' The same would be true if A should sue B on one bond, and in the same action decline to take judgment on the bond sued on, and take judgment on another bond of B, on which no suit had been instituted, without the consent of B": Anthony v. Kasey, 83 Va. 338, 5 Am. St. Rep. 277, 5 S. E. 176; Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; Munday v. Vail, 34 N. J. L. 418.

²⁵¹ Appellant was therefore without authority to bring or maintain this action.

Appellee having pleaded the statute of limitation, the burden devolved upon the appellant to prove that this action was brought within the time prescribed by the statute: Taylor v. Spears, 6 Ark. 381, 44 Am. Dec. 519; McNeil

v. Garland, 27 Ark. 343; Carnall v. Clark, 27 Ark. 500; Memphis etc. Ry. Co. v. Shoecraft, 53 Ark. 96, 13 S. W. 422; Leigh v. Evans, 64 Ark. 26, 41 S. W. 427. The policy and membership of appellee in the insurance company expired on the 1st of May, 1890. The insurance company was disincorporated on the eighteenth day of December, 1890, by the supreme court of Ohio. Its directors, during its life, were authorized by the laws of Ohio to apportion its losses and expenses among its members, and to give notice of such apportionment; and thirty days were allowed in which to pay the amount so apportioned. This could have been done and the statute set in motion before the company was disincorporated. It was therefore necessary for appellant to prove that it was not done, in order to show that his action was not barred. The proceedings of the supreme court of Ohio alone were not sufficient to show that the action was brought within the time prescribed by the statute, because the statute of limitation might in the manner indicated have been set in motion before such proceedings were instituted.

The evidence fails to show that this action was brought within the time prescribed by the statute of limitation.

Judgment affirmed.

In an Action Upon a Judgment rendered by a court of a sister state, the defendant may plead and prove a want of jurisdiction in the court which rendered the judgment: Chicago Title etc. Co. v. Smith, 185 Mass. 363, 102 Am. St. Rep. 350; Cuykendall v. Doe, 129 Iowa, 453, 113 Am. St. Rep. 472. See the note to Montgomery v. Consolidated Boat Store Co., 103 Am. St. Rep. 304.

LIDDELL v. BODENHEIMER.

[78 Ark. 364, 95 S. W. 475.]

JUDGMENTS—Entry Nunc Pro Tunc.—Parol evidence of an order omitted from the record, if satisfactory, is sufficient to authorize a nunc pro tunc or judgment. (p. 44.)

JUDGMENTS—Entry Nunc Pro Tunc—Limitations.—An application for a nunc pro tunc order cannot be barred by limitation. (p. 44.)

JUDGMENTS—Entry Nunc Pro Tunc.—A court has no authority to set aside or modify its judgment after the expiration of the term at which it was rendered, on application for a nunc pro tunc order. (p. 44.)

F. G. Taylor, for the appellant.

J. D. Block, for the appellee.

³⁶⁴ BATTLE, J. An action was brought in the name of Bodenheimer, Landau & Company against Robert Liddell, before a justice of the peace of Clay county, to recover the possession of certain personal property. Plaintiffs recovered judgment, and the defendant appealed to the circuit court.

In the circuit court (the term is not shown) plaintiffs represented to the court that the action was brought without their consent, and asked that it be dismissed, and thereupon S. D. ³⁶⁵ Hawkins, who had possession of the property in controversy and claimed the same, appeared, and asked that he be substituted for plaintiffs, and that the action proceed in his name as such. The action was dismissed as to Bodenheimer, Landau & Company, and revived in the name of S. D. Hawkins as plaintiff. This order was not entered of record.

At the January, 1894, term of the Clay circuit court for the eastern district, the action proceeded in the names of Bodenheimer, Landau & Company and S. D. Hawkins, plaintiffs, against Robert Liddell and John Matthews Apparatus Company, defendants, and Hawkins recovered judgment against the defendants for the property in controversy. This proceeding was had after the action was dismissed as to Bodenheimer, Landau & Company. On motion of the defendants the judgment in favor of Hawkins was set aside, and a new trial was granted.

At the August, 1895, term of the Clay circuit court for the eastern district of Clay county, the action was called for trial, and the plaintiffs failed to appear. Judgment by default was rendered against Bodenheimer, Landau & Company in favor of the defendant, Robert Liddell, for the property in controversy and costs.

In August, 1901, Bodenheimer, Landau & Company filed an application in Clay circuit court for the eastern district, in which they stated the foregoing facts, and asked that the order omitted from the record be entered nunc pro tunc. All parties appeared, and the court heard the application and the evidence adduced in respect thereto, and found that the order was made, and ordered that it

be entered, and ordered that the judgment in favor of Liddell against Bodenheimer, Landau & Company for property be corrected so as to be against Hawkins, and to show that Bodenheimer, Landau & Company were and are not parties thereto; and Liddell appealed.

Parol evidence of an order omitted from the record, if satisfactory, is sufficient to authorize a *nunc pro tunc* order or judgment: *Bobo v. State*, 40 Ark. 224; *Ward v. Magness*, 75 Ark. 12, 86 S. W. 822. The application for the order was not barred by the statute of limitations: 1 Freeman on Judgments, 4th ed., sec. 73, and cases cited.

The court erred in setting aside or modifying a judgment ³⁶⁶ which was actually rendered. It had no authority to set aside or modify a judgment after the term at which it was rendered has expired, on application for a *nunc pro tunc* order.

The *nunc pro tunc* order is affirmed, and the order setting aside or modifying a judgment rendered at a previous term is reversed.

Hill, C. J., did not participate.

In Entering an Order Nunc Pro Tunc the court is not confined, according to many authorities, to an examination of the judge's minutes, or written evidence, but may proceed on any satisfactory evidence, including parol testimony: See *Harris v. Jennings*, 64 Neb. 80, 97 Am. St. Rep. 635, and cases cited in the cross-reference note thereto.

TIPTON v. SMYTHE.

[78 Ark. 392, 94 S. W. 678.]

CONSTITUTIONAL LAW—Due Process of Law.—A statute providing for the calling in and payment of state bonds, and authorizing the state treasurer to pay valid bonds only, and thereby imposing upon him the duty of ascertaining the validity of all bonds presented for payment, is not unconstitutional as depriving a bondholder of his property without due process of law, as an appeal to the courts is always open to him from the adverse decision of the state treasurer. (p. 48.)

CONSTITUTIONAL LAW—Statute of Limitations.—A statute merely prescribing a period of limitations within which outstanding past due state bonds may be presented for payment and redemption, is not unconstitutional, either as depriving the bondholder of his property without due process of law, or as impairing the obligation of his contract. (p. 48.)

CONSTITUTIONAL LAW—Statute of Limitations.—The legislature may prescribe a period of limitation within which rights may be asserted, even though no limitation existed when the right accrued, or may shorten the period of limitation which existed when the right accrued, provided the added limitation is reasonable and affords ample opportunity for the assertion of existing rights. (p. 48.)

CONSTITUTIONAL LAW—Limitation of Actions.—In determining whether a statute of limitations affords a reasonable time for the assertion of rights existing at the time of its passage, the court must consider the circumstances under which it is to apply. (p. 50.)

CONSTITUTIONAL LAW—Statute of Limitations—Notice.—A statute providing for the calling in and payment of certain past due state bonds after six months' public notice before the day fixed for expiration of the time for presenting the bonds for payment, is not unconstitutional as imposing unreasonably short terms as to length of time or adequacy of the notice, either as to resident or nonresident bondholders. (p. 51.)

CONSTITUTIONAL LAW—Statute of Limitations.—A statute providing that certain past due state bonds shall be called in and paid upon six months' public notice, and that unless presented within such time the right of presentation and payment shall be barred, is not unconstitutional, as depriving a bondholder, whether resident or nonresident, of his property without due process of law, nor does it impair the obligation of his contract. (p. 52.)

CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.—A statute which deprives a holder of state bonds of the right to use his bond in payment of the purchase price of a certain class of public lands is not unconstitutional as impairing the obligation of a contract, if such statute provides for the payment by the state of the bond in money upon due presentation. (pp. 52, 53.)

R. L. Rogers, attorney general, for the state.

Bradshaw, Rhoton & Helm, for the appellee.

³⁹⁴ McCULLOCH, J. Appellee, R. M. Smythe, being the owner of a bond numbered 2034 in the sum of one thousand dollars, with fifty-five semi-annual interest coupons of thirty dollars each attached thereto, issued by the state of Arkansas on January 1, 1870, and due thirty years after date, applied to the commissioner of state lands to purchase a certain tract of Real Estate Bank lands situated in Phillips county at the price of two hundred and forty dollars, and tendered to the treasurer of state eight of said interest coupons in payment therefor.

The treasurer refused to accept said coupons on the ground that the bond and coupons attached were barred because not presented within the time required by an act of the General Assembly approved May 3, 1901, and appellee thereupon presented to the circuit court of Pulaski county

his petition for writ of mandamus to require the treasurer to accept said coupons in payment for the land.

³⁹⁵ The treasurer appeared, and demurred to the petition; the demurrer was overruled, and final judgment was rendered awarding the writ in accordance with the prayer of the petition, and the treasurer has appealed to this court.

Said bond was issued by the state pursuant to the provisions of an act of the General Assembly of April 6, 1869, providing for the funding of the public debt of the state, the particular bond in question being a reissue, under said act, of Real Estate Bank bonds then outstanding. Section 10 of said act of 1869 pledged the faith of the state for the payment of said bonds and interest, and to provide annually a sinking fund to pay off the principal as the same should become due. Section 11 of the act provides that "the proceeds of all of the mortgages, notes, bills, and other securities in possession of the state, obtained as security for the bonds issued to the Real Estate and State Bank, are hereby set aside as a sinking fund for the payment of the interest and principal of the bonds to be issued in pursuance of this act."

The act of May, 3, 1901, the validity of which is challenged by appellee, is entitled "An act to provide for the cancellation of certain state bonds, and to fix the rate of sinking fund tax." It provides (section 1) that immediately after its passage "the state treasurer shall make a call for all outstanding valid bonds of the state, except those of the issue of 1899"; and (section 2) that the publication should be made in a daily newspaper published in the city of Little Rock, and certified copies of the call should be filed with the secretaries of the stock exchanges of New York, Boston and St. Louis, six months before the day fixed in the notice for expiration of the time in which the owners of bonds were allowed to present bonds for redemption. Section 3 provides that the call or notice shall warn all holders of bonds to present same for redemption and payment within six months from the first day of said publication, "or that said bonds shall thereafter be null and void and nonpayable out of the treasury." Section 5 provides that all valid bonds presented within the time prescribed shall be redeemed and paid by the treasurer out of the moneys in his hands to the credit of the sinking fund, and

the succeeding section provides for a levy of taxes to raise a sinking fund, out of the which the bonds shall be paid.

Section 4 of the act is as follows: ³⁰⁶ "All persons who shall hold any of said valid bonds, and shall neglect or refuse to present same to the treasurer of state for redemption within the time prescribed by this act and set out in said notice, shall thereafter be debarred from deriving any benefit from same; and said bonds shall thereafter be invalid and nonpayable. The treasurer of state shall, upon expiration of the period of presentation and redemption herein fixed, indorse on the record of each of said bonds herein called in but not presented that same is barred of payment by the provisions of this act, and same shall no longer be carried on the books of the treasurer or auditor as part of the valid indebtedness of this state."

Appellee in his petition attacks the validity of the act of May 3, 1901, on the following grounds:

"A. Because said act seeks to deprive the owner of this bond of his property, without due process of law, by canceling said bond without payment, in violation of the constitution of the state of Arkansas, and of the constitution of the United States.

"B. Because said act seeks to call in or to cancel, without payment, an obligation of the state of Arkansas, under terms and condition which were not the law, and not therefore a part of the contract at the time of the issuance of said bond, and thereby impairs the obligation of the contract between the state of Arkansas and the holder of the bond, and said act is in conflict with the constitution of the state of Arkansas, and the constitution of the United States.

"C. Because the time within which to present said bond for payment is too short, and in violation of public policy.

"D. Because said act does not repeal section 4866 of Kirby's Digest, providing for the acceptance of said bonds in payment of the purchase price of Real Estate Bank lands belonging to the state of Arkansas."

A feature of both the first and second contentions of appellee, that the act in question seeks to call in and cancel the bonds of the state without payment thereof, can easily be disposed of by reference to the express terms of the act itself. The express object and purpose of the act is to call in the bonds for payment and redemption, and not for

adjudication as to their validity or ³⁹⁷ cancellation without payment. No unreasonable provisions are found in the act requiring the bondholder to submit his bond to the treasurer or any other person or board for final determination as to its validity. It is true that the act authorized the treasurer to pay valid bonds only, and thereby imposed upon him the duty of ascertaining the validity of all bonds presented for payment; but his adverse decision as to the validity of a bond was in no wise binding upon the bondholder, to whom the courts are always open for an adjudication of such questions. In this respect the act in question is entirely different from the statute condemned by this court in *McCracken v. Moody*, 33 Ark. 81, whereby holders of school district warrants were required to present them within a fixed time for cancellation and reissue, and to submit them for final determination as to their validity to a board composed of the county judge and county clerk.

It is urged against the validity of the statute that it is in violation of the constitution of this state and of the constitution of the United States, because the time within which the bonds must have been presented was too short, and the effect was to deprive the holder of his property "without due process of law," and that it impaired the obligation of the contract between the state and its bondholders inasmuch as, at the date of the issuance of the bond, no authority existed in the law for peremptorily calling in such obligations.

We do not think either contention is sound. The statute merely prescribes a period of limitation within which outstanding past due bonds of the state might be presented for payment and redemption. That the legislature may prescribe a period of limitation within which rights may be asserted, even though no limitation existed when the right accrued, or may shorten a period of limitation which existed when the right accrued, is too well settled now for controversy. The only restriction upon that power is that the added limitation must be reasonable, and must afford an ample opportunity for the assertion of existing rights, otherwise the effect would be to impair the obligation of a contract or to deprive a person of property without due process of law.

Chief Justice Waite, in delivering the opinion of the court in *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, said:

"This court has often ³⁹⁸ decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect (citing *Hawkins v. Barney*, 5 Pet. 457, 8 L. ed. 190; *Jackson v. Lamphire*, 3 Pet. 280, 7 L. ed. 679; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529). It is difficult to see why, if the legislature may prescribe a limitation when none existed before, it may not change one which has already been established. The parties to a contract have no more vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. . . . In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government unless a palpable error has been committed."

The same doctrine has been announced by that court in the following cases: *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886; *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. Rep. 854, 27 L. ed. 808; *In re Brown*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34 L. ed. 304; *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. Rep. 38, 42 L. ed. 392; *Saranac Land etc. Co. v. Comptroller of New York*, 177 U. S. 318, 20 Sup. Ct. Rep. 642, 44 L. ed. 786; *Wilson v. Iseminger*, 185 U. S. 55, 22 Sup. Ct. Rep. 573, 46 L. ed. 804.

To the same effect see *Cooley's Constitutional Limitations*, 7th ed., p. 523; 2 *Lewis' Sutherland on Statutory Construction*, sec. 668; *Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838; *Bigelow v. Bemis*, 84 Mass. 496.

It being therefore clear that the legislature had the power to pass a statute fixing a period within which the state's obligations should be presented for payment and redemption, it only remains for us to determine whether the statute in question prescribed a reasonable limitation upon the right of presentation. Of this the legislature is primarily the judge, as we have already seen: *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886.

"It is essential," says Judge Cooley, "that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the ~~300~~ time allowed is manifestly so insufficient that the statute becomes a denial of justice": Cooley's Constitutional Limitations, 7th ed., 523.

In determining whether or not the statute is reasonable, the court must consider the circumstances under which it is made to apply, and also whether the notice provided for is reasonable.

"It is evident from this statement of the question that no one rule as to length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another": *In re Brown*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34 L. ed. 304. However, a reference to cases will illustrate the shortest periods which the courts have approved as reasonable. The shortest statute of limitation of this state which has theretofore been passed upon by this court is the two years statute as to suits to recover lands held under sales for nonpayment of taxes, and the court has repeatedly upheld the statute: *Ross v. Royal*, 77 Ark. 324, 91 S. W. 178; *Finley v. Hogan*, 60 Ark. 499, 30 S. W. 1045.

In *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, a statute which limited the time for bringing suit to nine and a half months was held not unreasonable.

In *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. Rep. 38, 42 L. ed. 392, the supreme court of the United States, following the decision of the New York court of appeals in *Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322, 56 N. E. 838, held that a statute of that state providing that deeds from the comptroller of the state of lands in the forest preserve sold for nonpayment of taxes should, after having been recorded for two years and in any action brought more than six months after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, was a statute of limitation, and as such was reasonable and valid. This decision was also

followed in *Saranac Land etc. Co. v. Comptroller*, 177 U. S. 318, 20 Sup. Ct. Rep. 642, 44 L. ed. 786, where Mr. Justice McKenna, speaking for the court, said: "The decision (in *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. Rep. 38, 42 L. ed. 392) establishes the following propositions: 1. That statutes of limitations are within the constitutional power of the legislature of a state to enact; 2. That the limitation of six months was not unreasonable."

In *Vance v. Vance*, 108 U. S. 514, 2 Sup. Ct. Rep. 854, 27 L. ed. 808, the same court upheld as reasonable a provision of the constitution of the state of Louisiana ⁴⁰⁰ adopted in 1868, and a statute pursuant thereto passed March 8, 1869, requiring that all "tacit mortgages [in favor of a minor on the property of his tutor] and privileges now existing in this state shall cease to have effect against third parties after January 1, 1870, unless duly recorded." The statute gave only the period from the date of passage March 8, 1869, until January 1, 1870, within which such mortgages might be recorded, and the court held it to be a reasonable provision, even against an infant.

In *Krone v. Krone*, 37 Mich. 308, the court, by Judge Cooley, upheld a statute shortening the period of limitation to one year on causes of action then existing. In *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 Am. St. Rep. 516, 81 N. W. 72, 46 L. R. A. 715, a statute under which an existing cause of action could be asserted within nine months after the statute went into effect was upheld as reasonable. In *Bigelow v. Bemis*, 84 Mass. 496, the supreme court of Massachusetts held that a statute was reasonable which shortened the period of limitation and left about five months within which an existing cause of action might be asserted.

Applying the rule illustrated by these cases, we see no grounds upon which the statute under consideration can be held to be unreasonable.

It must be remembered that when this statute was passed the bonds were past due about a year and a half. The statute required the notice to be published in a daily newspaper in the capital city of the state, and certified copies to be filed with the secretaries of the stock exchanges of New York, Boston and St. Louis for six months before the expiration of the time for presenting the bonds for payment.

It is alleged in the petition that appellee was, at the time of the passage of this act and the publication of the

notice, without the limits of the United States, and had no information thereof. It is argued that the statute was unreasonable because a bondholder so situated could receive no notice of the terms of the statute. The same argument could be made in favor of a bondholder in foreign lands if the statute had given six years, instead of six months, for presentation if he had been making no effort to secure payment of his matured demand against the state. The legislature doubtless had in contemplation, when it fixed a short period, that the bonds were past due, and that the ⁴⁰¹ holders were accessible and in waiting for payment. It was not unreasonable to anticipate such a condition, and indulge the reasonable presumption that the holders of matured bonds would receive notice given in the manner pointed out by the statute. It is known that such securities are generally handled through the medium of the stock exchange in the principal cities of the country, and that information concerning their value may be ascertained through those channels.

We cannot say that the statute imposed such unreasonable terms, either as to the length of time or adequacy of the notice, that it deprived the bondholder of his property "without due process of law," or impaired the obligation of the contract.

Again, it is argued that the statute in question impairs the obligation of the contract if it be construed to bar the bondholder of using the bond in payment of Real Estate Bank lands, as provided by statute: Kirby's Digest, sec. 4866. The statute just cited provides that such bonds shall be receivable in payment of the purchase price of Real Estate Bank lands, but it was enacted February 26, 1879, long after the issuance of the bonds, and therefore its provisions did not enter into and become a part of the contract. But, conceding that they did, the contract was in no wise impaired by the act of May 3, 1901, as payment of the bond in money was provided for, and would have been made if it had been presented. The supreme court of the United States in the case of *In re Brown*, 135 U. S. 662, 10 Sup. Ct. Rep. 972, 34 L. ed. 304, where a statute authorizing the issuance of refunding bonds, as an inducement for acceptance of the bonds, provided that they should be receivable for taxes, held that a subsequent statute limiting the time within which the same might be so used was void because

it impaired the obligation of the contract. The decision was placed upon the ground that, as long as the bonds remained unpaid, the holder had, according to the terms of the original statute authorizing the issuance of the same, the right to use them in payment of taxes, and that a restriction of that right impaired the obligation to that extent. No provision was made for payment of the bonds within the limits prescribed by the new statute, and the court found that it would be impracticable for the bondholder to use all the bonds in payment of taxes within the time prescribed.

⁴⁰² The statute we are now considering is vastly different in its operation. There can be no higher method of discharging a past due obligation than by payment in money; and when this method of payment was provided by the statute, the bondholder sustained no impairment of his contract by being deprived of the right to use it in payment for lands.

Lastly, it is contended that the statute does not in express terms repeal the act of 1879, making the bonds receivable in payment of the purchase price of Real Estate Bank lands, and should be construed not to deprive the holder of that right given by the former statute. The statute in the broadest terms provides that bonds not presented within the time prescribed should thereafter be treated as invalid and barred for all purposes. By no sort of reasoning can the act be construed to leave the bonds in force for the purposes of use in payment for lands purchased from the state.

The circuit court erred in awarding the writ of mandamus, and the judgment is reversed and cause remanded, with directions to sustain the demurrer to the petition.

Constitutional Law.—*Statutes of Limitation* affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect: *Soper v. Lawrence*, 98 Me. 268, 99 Am. St. Rep. 397. The statutory period of limitation may be shortened, provided a reasonable time for the bringing of actions is allowed: See *Tice v. Fleming*, 173 Mo. 49, 96 Am. St. Rep. 479; *Osborne v. Lindstrom*, 9 N. Dak. 1, 81 Am. St. Rep. 516.

The Retrospective Operation of Statutes of Limitation is the subject of a note to *Brown v. Pinkerton*, 111 Am. St. Rep. 455.

**ARKANSAS SOUTHWESTERN RAILWAY COMPANY v.
DICKINSON.**

[78 Ark. 483, 95 S. W. 802.]

RAILROADS—Power to Offer Rewards.—A railroad company has implied power to offer a general reward for the arrest and conviction of any person found maliciously placing obstructions upon its tracks, changing switches or doing any act for the purpose of causing derailments or the wreck of trains. (p. 56.)

RAILROADS—Power of General Manager to Offer Reward.—The general manager of a railroad company has authority to offer a general reward for the arrest and conviction of any person found maliciously obstructing its tracks. (p. 56.)

RAILROADS—Offer of Reward by General Manager—Notice.—Evidence that a person who offered a reward for the arrest and conviction of any person found maliciously obstructing the railroad track had acted for three years as the general superintendent of a railroad company, that notices offering such reward were posted at every station of such company, and must have been seen by its president, that such notices were furnished to such manager by the vice-president of the company, and that the act of such manager in offering the reward was never repudiated by the company, is sufficient to sustain a finding that the other officers of the railroad company were cognizant of and ratified the act of offering such reward. (p. 56.)

REWARDS—Conviction as Evidence.—If a railroad company offers a reward for the arrest and conviction of any person found maliciously placing obstructions on its track, the record of the conviction of a person for such offense is admissible, and prima facie evidence of his guilt in an action to recover the reward. (p. 58.)

APPEAL—Presumption.—If the record shows that a paper was placed in evidence, it must be presumed on appeal that its contents were made known to the jury on the trial. (pp. 59, 60.)

B. S. Johnson, for the appellant.

McRae & Tompkins, for the appellee.

⁴⁸³ WOOD, J. Appellee sued appellant on the following:

“REWARD.

“One thousand dollars reward will be paid upon the arrest and conviction of any person or persons found maliciously, without ⁴⁸⁴ regard to the lives of employés or passengers, placing obstructions upon the track, changing switches, etc., for the purpose of causing derailments or wrecks.

“ARKANSAS SOUTHWESTERN RY. CO.

“J. J. KRESS, Manager.”

Appellee alleged: "That said reward was offered by posting same along the tracks and at the depot houses of the defendant company, in Pike county, Arkansas; that on the sixth day of October, 1902, the plaintiff procured the arrest of one Zach Furlow charged with the offense of maliciously placing obstructions upon the track of the defendant company in Pike county, Arkansas, the said Zach Furlow subsequently being indicted by the grand jury of Pike county, Arkansas, for said offense, and he was on the twentieth day of August, 1903, duly convicted of said offense by the consideration and judgment of the circuit court of Pike county, which said judgment was on the thirtieth day of April, 1904, duly affirmed by the supreme court of the state of Arkansas. Copies of said record of conviction are filed herewith, and made a part of this complaint."

Appellee further alleged that he had, at great expense of time and money, procured the arrest and conviction of the said Zach Furlow, and is entitled to recover said reward, amounting to the sum of one thousand dollars, which the defendant wholly neglects and refuses to pay after proper demand made therefor.

Appellant answered, denying specifically all the allegations of the complaint, and denying that it ever authorized J. J. Kress or any other person to offer said reward, and set up that the person alleged to have been arrested and convicted at the instance of Joe Dickinson, Jr., was not guilty of said offense or any other offense; that the said Zach Furlow, the person arrested, was found maliciously, without regard to the lives of employes and passengers, placing obstructions upon the track, changing switches, or anything else, for the purpose of causing derailments or wrecks, and denies that said Zach Furlow was ever at any time found placing obstructions upon tracks and changing switches for any purpose whatever.

Plaintiff recovered judgment for the amount of the reward, and defendant appealed.

⁴⁸⁶ 1. Appellant contends that it did not offer the reward. The proof showed that one who had acted for more than three years under the title and in the capacity of general manager of the road, with the knowledge of the president, had posted the reward. He had received the card offering the reward by express from the office of the vice-president

in St. Louis, with instructions to post same. This was done at every station, and the president of the road passed over it as often as every ten days.

In *Central Railroad etc. Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48, 4 South. 828, it was held that a railroad corporation has the implied power to offer a general reward "for the detection, apprehension and bringing to justice of persons obstructing the road," and that authority to offer such rewards is incident to the business and duties of the superintendent, and to the purposes of his department, and consequently within the scope of this agency. This is sound doctrine. But appellant contends that the agency of Kress has not been established by competent proof. The court ruled that the agency of Kress could not be established by what he said, but that his acts in the capacity of superintendent and general manager might be considered. This was correct, since there was proof to justify the conclusion that these acts were assented to by the company: *St. Louis etc. Ry. Co. v. Bennett*, 53 Ark. 208, 22 Am. St. Rep. 187, 13 S. W. 742. We are of the opinion that the proof was sufficient to show that Kress was the superintendent and general manager of the road he was seeking by the offer of the reward to protect. But if not, still appellant is shown to have had knowledge of his acts as superintendent and general manager, for he had acted in that capacity and under that title for more than three years, and appellant had not repudiated any of his acts as such. And appellant is shown to have had knowledge, not only of his acts in general, but of this specific act, for the knowledge of its president would be sufficient to show that the company had knowledge. The company can only act through its representatives. The president ⁴⁸⁷ of the company, as we have said, went over the road every ten days, and these rewards were posted at every station. This and other evidence, such as the fact that the reward came from the office of the vice-president, was entirely sufficient to show that the company had knowledge of the act of Kress in offering the reward. In *Central Railroad etc. Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48, 4 South. 828, the court said: "On questions of ratification, facts that circulars were posted at various places on the line of the railroad, by direction of an employé who was under the control of the superintendent, and remained

posted for several months and until after the rendition of the service, were proper to go to the jury as tending to show that the officers of the company were cognizant of the superintendent's act in offering the reward."

2. Appellant contends that, before it could be held liable, it was essential that the appellee prove that Zach Furlow placed obstructions upon appellant's track within the terms of the published reward. Appellants contend that there is no such proof, and that the papers and record of the proceedings showing that Zach Furlow had been arrested and convicted of the criminal offense in which he was so charged was not sufficient to show that appellant's track had been obstructed in the manner set forth in the offer of reward, and appellant objected to such papers and record going to the jury as evidence of that fact. There is in the record an affidavit made by appellee before a justice of the peace charging Zach Furlow, with others, of the offense of "maliciously placing obstructions on the Arkansas Southwestern Railroad." Appellee testified that he procured the arrest of Zach Furlow on this charge, and assisted in his prosecution for same because of the offer of the reward. The indictment on which Zach Furlow was convicted in the circuit court charged that he "did unlawfully, feloniously, etc., place an obstruction upon the track of the Arkansas Southwestern Railway Company." The trial court permitted the indictment and the record of conviction of Zach Furlow in the circuit court to go before the jury for the purpose of showing his conviction, and also the mandate of the supreme court, showing that the judgment of the circuit court was affirmed, for the same purpose.

On the cross-examination of appellee by appellant this appears in the record: "Q. This is the affidavit [exhibiting paper] ⁴⁸⁸ that you made, is it? A. Yes, sir.

"Q. Now, you say the reward was put up the next day after the offense was committed? A. Well, I saw it the next day after it was committed."

One of the witnesses for appellee testified as follows: "Q. Mr. Westbrook, do you remember the circumstances of the track having been obstructed between Delight and Antoine? A. Yes, sir. I remember hearing of it.

"Q. With reference to that, when was the reward stuck up, as you remember? A. To the best of my knowledge,

it was two or three days, something like that, after the obstruction was placed on the track; wouldn't be positive about that; just after something of that kind had happened, whether it was that particular obstruction I could not say.

"Q. You remember the circumstance of Zach Furlow being arrested charged with this offense? A. Yes, sir.

"Q. And he was arrested for an obstruction between Delight and Antoine?"

The defendant objected to that part of the question referring to the place where the obstruction occurred, and the objection was by the court sustained.

Another witness testified that he "remembered the circumstance of Zach Furlow's being arrested over there for placing obstructions on the track."

A reasonable interpretation of this contract is that the railroad company offered a reward of one thousand dollars for the arrest and conviction of any person or persons charged with the offense of placing obstructions upon a railroad track under section 1999 of Kirby's Digest. The arrest and conviction of any person for the offense was evidently aimed at by the appellant, and the appellee accepted and duly performed the contract on his part when he secured the arrest and conviction of a person for that offense. It is obvious from the language of the reward that the company contemplated in its offer that the conviction for the offense should be taken as an evidence of the fact that the offense had been committed, and that the person convicted was the real offender. If this be the correct construction of the contract, the doctrine of *res inter alios* does not apply. In *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430, 30 N. E. 85, 15 L. R. A. 809, the offer of reward was as follows: "\$2,500 reward will be paid for any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham." The plaintiff in that case had furnished ⁴⁸⁹ evidence that led to the arrest and conviction of a person for the shooting of Cunningham. In the civil suit for the reward it was proved by the record that one De Lucca had been convicted for shooting Edward Cunningham, and De Lucca's evidence at his trial, admitting that he shot Cunningham, was also put in, but the defendants contended in that case, as appellant contends here, that such evidence was *res inter alios*, and

not competent to prove the action against them for the reward that De Lucca was the guilty man. The court said: "This position rests on too strict a construction of the words 'the person who shot Mr. Edward Cunningham' in the contract. We will assume that they mean a little more than 'a person for shooting,' and that it would be open to the defendants to prove mistake or fraud in the conviction. But we have no doubt that the contract so far adopts the proceedings of the criminal trial as a test of liability that the conviction is *prima facie* evidence of guilt." In *Borough of York v. Forscht*, 23 Pa. 391, a reward was offered "for the detection and conviction of the person who set fire to" a certain barn, and the suit was to recover on this offer of reward by one who had given the information upon which a certain party was arrested, and afterward tried and convicted. The court held, quoting syllabus, "where a reward is offered for the detection and conviction of an offender, and a person is detected and convicted, the record of conviction is evidence in an action for the reward that the person convicted is the true offender." The doctrine of these cases comports with our construction of the contract under consideration: See *Brennan v. Haff*, 1 Hilt. (N. Y.) 151, and *Mead v. City of Boston*, 3 Cush. (Mass.) 404. See, also, *contra*, *Burke v. Wells, Fargo & Co.*, 34 Cal. 60.

But aside from this, it is doubtful from the state of the record whether appellant could avail itself of a failure on the part of appellee to make proof that the offense was actually committed, and that Zach Furlow was the real offender, when on the trial below it objected to evidence that was tending in that direction.

3. The objection made here for the first time that the court erred in permitting the indictment and the record of conviction in the circuit court and the mandate of the supreme court in the case of *Furlow v. State*, 72 Ark. 384, 81 S. W. 232, to be introduced in ⁴⁰⁰ evidence without being read to the jury, cannot avail appellant. The record shows that "it was agreed by the parties that they [these papers] be considered as read to the jury." Such being the case, appellant is in no position to complain that such papers were not read, and it will not be heard to make such complaint. An amended record, brought here by agreement, shows that "upon the trial of this case in the lower court, the man-

date, judgment and indictment were introduced." That effectually answers the contention in the brief that the court erred in not having these papers read to the jury under section 3145 of Kirby's Digest. Where a paper "is introduced in evidence," it must be considered here that its contents were made known to the jury.

4. Measured by the doctrine already announced, we find the instructions of the court correct.

Affirm.

A Railroad Company has implied power to offer a general standing reward for the detection, apprehension and bringing to justice of persons who may obstruct its road, or otherwise offend against its property rights, and such authority is incident to the business and duties of the superintendent, and to the purposes of his department, and consequently is within the scope of his agency: *Central R. R. etc. Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48.

SCOGGIN v. HUDGINS.

[78 Ark. 531, 94 S. W. 684.]

EXECUTORS AND ADMINISTRATORS—Liability of Decedent's Lands for Debt.—Land of a decedent, while held by his heirs, may, in equity, be subjected to sale for the payment of his debts accruing after the time allowed for the probate of claims has expired. (p. 62.)

EXECUTORS AND ADMINISTRATORS—Liability of Decedent's Lands for Debts—Innocent Purchasers.—Interests or estates in lands of a decedent in the hands of innocent purchasers for value, and acquired from the heirs before the commencement of a suit to charge them with the payment of the decedent's debts, cannot be subjected thereto either in law or equity. (p. 62.)

COVENANTS—Breach—Right of Action.—If land subject to a mortgage is conveyed with warranty of title and against encumbrances, the covenantee's right of action for breach of the covenant accrues on his paying the judgment recovered by the mortgagee's receiver for the purpose of saving the land from sale. (p. 63.)

HOMESTEADS OF DECEDENTS—Claims of Creditors—Lien. If a claim for a breach of covenant of warranty in a deed against a decedent does not accrue until after the close of the administration of his estate, the covenantee is entitled, on recovering judgment, to have it declared a lien on the decedent's homestead, to be sold only after the homestead has expired, although a constitutional provision declares that a homestead shall not be subject to the lien of any judgment or decree, or to sale under execution or other process thereon. (p. 63.)

O. A. Graves, for the appellants.

D. B. Sain and W. C. Rodgers, for the appellee.

⁵³³ **BATTLE, J. J.** J. Hudgins brought a suit against the heirs of W. G. Scoggin, deceased, to subject certain lands descended to them to the satisfaction of his certain claim against the deceased.

Sometime in the year 1892, W. G. Scoggin, in consideration of the sum of seventy-five dollars paid to him by J. J. Hudgins, conveyed a certain tract of land to Hudgins, and covenanted with him that he would forever warrant and defend the title to the land against all lawful claims. At the time of the execution of the deed there was a valid mortgage on the land in favor of the Southern Building and Loan Association to secure an indebtedness of three hundred and fifty dollars. Thereafter Scoggin died intestate, leaving the defendants, his heirs, surviving him; and on the nineteenth day of April, 1893, letters of administration were granted and issued to his widow, M. L. Scoggin. Sometime in the year 1900 J. A. Bowman, as receiver of the Southern Building and Loan Association, instituted a suit in the circuit court of the United States for the Texarkana Division of the western district of Arkansas to foreclose the mortgage on the land in favor of the building and loan association, making ⁵³⁴ Hudgins and others defendants. When that suit was instituted, Hudgins notified and requested the administratrix of Scoggin's estate to defend against it, which she failed to do. On the twenty-fourth day of May, 1900, Bowman, as receiver in the suit instituted by him, recovered a decree foreclosing the mortgage and for one hundred and eighty-six dollars and sixty-two cents; and on the tenth day of December, 1900, for the purpose of protecting and saving his lands from sale, Hudgins paid the amount recovered by the decree.

Scoggin died, seised and possessed of certain lands described in the complaint. Forty-four acres of this land constituted his homestead, and after his death was occupied as a homestead by his widow and minor heirs. The remainder contained thirty-eight acres. Before the institution of this suit W. M. Greene acquired the interest and share of one of the heirs, Jane Scoggin, in these lands, without any actual

or personal knowledge on his part of any claim of Hudgins, vested or expected.

The court found that the administratrix was not a proper party to this action, and that W. M. Greene had acquired and was entitled to hold the interest of James Scoggin in the lands, and as to them, administratrix and Greene, dismissed the suit; and decreed that Hudgins was entitled to recover seventy-five dollars and six per cent per annum interest thereon from the tenth day of December, 1900, and that the same is a lien on the lands owned by Scoggin in his lifetime, and upon the land occupied by the widow and minors, subject to their rights of homestead; and that, if the seventy-five dollars, interest and costs are not paid on or before January 1, 1904, Hudgins have a special execution against the lands to satisfy his judgment and costs. The defendants appealed.

The administration of Scoggin's estate closed before the accrual of appellee's cause of action, the two years for the probate of claims having expired on the 19th of April, 1895. It is settled by decisions of this court that the lands of the deceased, while they are held by the heirs, may in equity be subjected to sale for the payment of such claims: *Williams v. Ewing*, 31 Ark. 229; *Hecht v. Skaggs*, 53 Ark. 291, 22 Am. St. Rep. 192, 13 S. W. 930; *Berton v. Anderson*, 56 Ark. 470, 20 S. W. 250. But interests or estates in lands acquired by innocent purchasers for value before the commencement of a suit to charge them with the payment of such claims cannot be lawfully or equitably subjected to such charges: *Berton v. Anderson*, 56 Ark. 470, 20 S. W. 250.

⁵³⁵ Hudgins' cause of action accrued on the tenth day of December, 1900, when he paid the judgment recovered by Bowman, as receiver. He was not bound to wait until he was actually disseised. If he had done so, his right of redemption would have expired, and he would have lost the land, with the right to recover on the covenant of his grantor only a small part of its value. Why submit to such loss? Why wait for the inevitable? Equity does not require such sacrifice: *Collier v. Cowger*, 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107; *Dillahunty v. Little Rock etc. Ry. Co.*, 59 Ark. 629, 634, 27 S. W. 1002, 28 S. W. 657; 8 Am. & Eng. Ency. of Law, 2d ed., 203, and cases cited.

The chancery court virtually declared a lien on the land occupied by the widow and minors as a homestead, and ordered that it be sold subject to such homestead. The constitution of this state declares that "the homestead of any resident of this state who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except," etc.: Const. 1874, art. 9, sec. 3. But it does not prevent the courts from protecting creditors in their rights in such cases as this. The heirs may sell the lands descended to them to innocent parties for value before the commencement of suits in equity by creditors to subject them to the payment of their claims. Unless the lands constituting the homestead can be held in some way, creditors of a deceased person, holding claims accruing after the close of the administration of his estate, will be left to the mercy of heirs. A declaration that the claim of the creditors is a lien on the land, but it shall not be sold until the homestead expires, would be nothing more than a declaration of the equitable rights of the creditor, and would not interfere, directly or remotely, with the homestead rights, and would be stripped of the evil effects of the liens prohibited by the constitution, and would not belong to that class of liens.

The cause is remanded, with instructions to the court to modify its decree in accordance with this opinion.

Heir's Liability for Ancestor's Debts.—For Authorities bearing upon the principal case, see the recent note to *Crawford v. Turner*, 112 *Am. St. Rep.* 1020-1023.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

UNITED BROTHERS v. WILLIAMS.

[126 Ga. 19, 54 S. E. 907.]

CORPORATIONS.—After the Charter of a Corporation has Expired It is Without Authority to take any proceedings of a corporate nature for the purpose of expelling a member of the late corporation, and thus depriving him of property rights. (p. 66.)

CORPORATIONS.—On the Expiration of the Charter of a Corporation Its Property is Held in Trust for its members. (p. 66.)

CORPORATIONS.—On the Renewal of a Corporate Charter Which has Theretofore Expired, all the property of the old corporation then in the hands of its officers and members is carried into the new corporation as created by the renewal of the charter. (p. 67.)

CORPORATIONS—Rights of the Members of the Old Corporation on the Renewal of Its Charter.—On the renewal of the charter of an expired corporation, each person interested in the assets of the corporation as a member at the date the old charter expired becomes a member of the corporation created by the renewal, and the corporation as renewed is bound to admit into membership every person interested in the property of the old corporation as it existed at the date of the expiration of the charter. (p. 67.)

CORPORATIONS.—Mandamus is a Proper Remedy for One Who has Been Unlawfully Deprived of His Privilege as a Member of the Corporation. (p. 67.)

CORPORATIONS.—The Expulsion of a Member of a Corporation Because He has Testified Against It in an action to which it was a party is wholly unauthorized where there is no claim that he testified falsely, and if the corporate charter expires and a new one is obtained he cannot be denied membership on account of such testifying. (p. 68.)

Marion W. Harris and Julian F. Urquhart, for the plaintiff in error.

F. R. Martin, contra.

²⁰ COBB, P. J. This was an application for a mandamus by Hamp Williams against the United Brothers, alleged to be a corporation of this state. It appears from the petition and amendments thereto that a corporation called the United Brothers was created by an order of the superior court of Bibb county at the April term, 1883. The purpose of the corporation was to promote systematic benevolence by providing a fund for taking care of sick members, and paying the expenses of burial of members and members of their families. There was no capital stock, but the funds of the association were to be derived from membership fees and dues. The plaintiff became a member of the association soon after its organization, the exact date not appearing. The charter of the association expired on the eighth day of May, 1903. When the charter expired the association did not go into liquidation, but the members and officers conducted the business of the association as if the corporation still existed. This state of affairs continued until 1905, when a petition to the superior court was filed by the United Brothers, describing itself as a corporation whose charter had expired, and S. J. Hammond, one of its original incorporators, and other named persons, alleging that the charter was granted to the United Brothers on May 8, 1883, which expired May 7, 1903, and that petitioners desired to revive the corporation with all the rights of the original charter as the same appeared on the records of the court. It was also asked that they be given authority to organize branch societies in other ²¹ counties, and provide constitutions and by-laws for their government. The prayer was that it be "incorporated and renewed for a period of twenty years." On this petition an order was passed, April 19, 1905, granting the same. In 1904, after the original charter had expired and before the same was renewed, the plaintiff at a regular meeting was declared expelled from the association. This was done without notice of any charge against him, the president of the association merely stating to the meeting then in session that the plaintiff had testified against the association in a suit against it, and as a result of his testimony the case was decided against the association. The plaintiff was, under the charter and by-laws, entitled to certain substantial benefits in case of sickness or death in his family. It is distinctly alleged that the plaintiff's testi-

mony in the case referred to was true, and that the sole reason for expelling him was the fact that he had testified as a witness. The plaintiff made an effort to have himself reinstated, but the association denied him all the rights and privileges of membership. It is charged that the expulsion of plaintiff was without authority, and was the result of malice on the part of the president of the association, who was responsible for the litigation referred to. It was alleged that at the time the plaintiff was expelled the association had assets to the amount of one hundred dollars in cash, in which plaintiff was interested. The prayer of the petition was for the writ of mandamus, commanding the corporation to reinstate the plaintiff to his privileges as a member. The petition was filed on April 17, 1905. The defendant filed demurrers, both general and special, which were overruled, and the defendant excepted.

The plaintiff was a member of the corporation at the time its charter expired in 1903. At the time the proceedings were had which purported to expel him from the association there was no corporation in existence. ²² The affairs of the former association were being carried on in an irregular, if not an illegal, way. At that time the plaintiff was interested in the property of the association on account of having been a member at the date of the expiration of the charter. The officers and members were then without authority to take any action in the nature of corporate proceedings which would deprive the plaintiff of his property rights. The assets and funds of the association were to be held by them until the association went into liquidation and a division took place, or until the charter was renewed in conformity to law. The proceedings purporting to expel the plaintiff from the association were therefore a nullity; for there was no corporation from which to expel. He was a part owner with the other members in assets held by the old officers in trust for all the members. It is to be noted that a new charter for a new corporation was not granted. The old charter was renewed with certain amendments. The effect of the renewal of the charter was to carry the property of the old corporation then in the hands of the officers and members into the corporation as created by the renewal of the charter. Every person interested in the assets of the corporation as a member on the date the old charter expired

became a member of the corporation created by the renewal of the charter. It was renewed under the same name with all the powers the original corporation had, and others added thereto. The corporation as renewed was bound to admit into membership every person interested in the property of the corporation as it existed at the time of the expiration of the charter. The power to deal with the members, assets and property of the association in a corporate capacity died upon the expiration of the charter, but came to life with the renewal of the charter. Persons interested as members of the old corporation lost no rights by the irregularities that took place between the expiration of the old charter and the granting of the new charter. When the corporation began business under the new charter with the funds and property of the old corporation as a basis for its operation, all members of the old corporation were entitled to the privileges and benefits which they would have had if the charter had not expired. As members of the old corporation, they had no authority to deal with and expel the plaintiff at the time the alleged action was taken against him. He became a member of the new corporation created by the renewal of ²³ the charter. He is entitled to all the rights and privileges of a member. This has been denied to him. Undoubtedly he has a right of action against the corporation for refusing to admit him as member, but this remedy would not be adequate. He could recover damages, but damages are not desired. He wishes to be restored to membership, so that he may exercise the privileges and receive the benefits resulting from membership in the corporation. There are numerous decisions in other jurisdictions that mandamus is a proper remedy to be resorted to by one who has been wrongfully deprived of his privileges as a member of the corporation: *Bacon on Benefit Societies*, 3d ed., secs. 109, 442. In *State v. Georgia Medical Soc.*, 38 Ga. 608, 95 Am. Dec. 408, it was held by this court that where a corporator has a clear legal right which has been violated by the corporation, and he has no other adequate remedy, he is entitled to relief by mandamus: See, also, *Savannah Cotton Exchange v. Warfield*, 54 Ga. 668. In the opinion in the *Waring* case, Mr. Chief Justice Brown says: "When a member feels that he is aggrieved or injured by the illegal or oppressive action of the body, it is his right

to appeal to the courts for redress and protection; and it is the right and duty of the court to investigate such charges, when properly before it, and to judge of the legality of the action of the society in expelling a member or depriving him of any other legal right."

The only reason alleged for the action of the corporation in declining to admit the plaintiff as a member is that he testified to the truth as a witness in a case where the association was a party. Even if the corporation had been in existence at the time of the alleged action purporting to expel him therefrom, this would not have been sufficient to justify an expulsion. He could not have been legally expelled for this reason, even if he had had a formal trial, after due notice, according to the by-laws of the association. Certainly, then, upon the renewal of the charter he cannot be denied admission into the association on account of the purported action of the association at a time when it had no right to deal with the question of expulsion. There was no error in overruling the demurrers.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

The Right of a Corporation or association to expel members is discussed in the recent note to Del Ponte v. Societie Italiana, 114 Am. St. Rep. 24.

DAVENPORT v. STATE BANKING COMPANY.

[126 Ga. 136, 54 S. E. 977.]

BANKS.—The Relation Between a Bank and Its Depositors is that of Debtor and Creditor. The money deposited becomes the absolute property of the bank, and as it is merely the debtor of the depositor, it has no lien on his deposit for the purpose of securing a debt due to it from him, though it may have the right to set off the one against the other. (p. 76.)

A BANK Does not Owe to the Surety of an Indebtedness in Its Favor the Duty of exercising its right to set off a sum due from it to the depositor against the indebtedness of such depositor to it which the obligation of surety has created. (pp. 77, 78.)

BANKING.—Surety, Duty of Bank to Apply Deposit to the satisfaction of Indebtedness Secured by.—If a bank holds the note of one of its depositors with a surety, it owes no duty to the surety

to apply to the satisfaction of such note a sum due by it to the depositor on his general deposit account, and hence such surety remains liable notwithstanding he demands that such application be made, and the bank refuses to make it. (p. 84.)

Action by the State Banking Company on two notes against the surety of one Lipscomb. The defendant pleaded that when the indebtedness became due, and for some time afterward, the maker of the notes had on deposit with the bank a sum more than sufficient to pay them, and that the defendant demanded of the president of the bank that the notes be satisfied out of the moneys so on deposit, and the bank refused to make such application, and permitted the maker of the notes to check out all of his money to pay fines imposed on him for selling liquor without a license, thereby rendering such maker insolvent. The plea was stricken out as constituting no defense, and the defendant excepted.

H. H. Dean, for the plaintiff in error.

Fletcher M. Johnson and J. A. Bell, Jr., contra.

128 COBB, P. J. The precise question made in this case has never been decided by this court, and in respect thereto there is, in principle, a conflict in the decisions which have been rendered in other jurisdictions. We say there is a conflict in principle, because if we take the cases in which a surety upon a note held by a bank claimed to have been discharged because, at the time of its maturity, the principal had sufficient funds on general deposit in the bank to pay it, and the bank failed to charge the amount of the note up against such deposit account, there is really not much conflict. But when we consider the principle, or principles, upon which these cases, holding the surety discharged, have been decided, and then consider the cases in which the failure of a bank to exercise its right of setoff against deposits of the maker of a note, made subsequently to its maturity, has been held not to discharge a surety upon such note, and the reasons upon which these decisions have been based, we find that there is a marked and, to us, an irreconcilable conflict in the authorities upon the question under consideration. It has been held in a number of cases that where a bank is the owner of a note or other obligation evidencing an indebtedness, upon which there is a surety, and at the

maturity of the debt the principal debtor has funds on general deposit with the bank, sufficient to pay the debt. the failure of the bank to apply such funds to its payment will discharge the surety: *Commercial Bank v. Henninger*, 105 Pa. 496; *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20; *Dawson v. Real Estate Bank*, 5 Pike (Ark.), 283; *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203; *Central Bank of Rochester v. Thein*, 76 Hun, 571, 28 N. Y. Supp. 232. The ¹³⁹ contrary view was taken in *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep. 239, *Martin v. Mechanics' Bank*, 6 Har. & J. (Md.) 235, and *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368. For although in the Massachusetts case, and perhaps in each of the other two, the decision might have been placed upon the narrow ground that it did not appear that at the maturity of the note the bank held on general deposit funds of the principal sufficient to pay it, in none of these cases was this done, but the decision in each case was placed upon the broad ground that the bank was not bound to set off the amount of a note due to it by a depositor against his general deposit account, for the protection of a surety upon the note. It has been held by almost all the courts where the questions have arisen that if at the maturity of a note held by a bank the principal thereon has not sufficient funds on general deposit with the bank to pay it, the bank is under no duty to a surety upon the note to apply such funds of the principal as may then be on deposit to the payment of the note pro tanto, nor is it bound to pay the note from subsequent deposits of the principal, although they are sufficient for this purpose: *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126; *First Nat. Bank of Lancaster v. Shreiner*, 110 Pa. 188, 20 Atl. 718; *First Nat. Bank of Lock Haven v. Peltz*, 176 Pa. 513, 53 Am. St. Rep. 686, 35 Atl. 218, 36 L. R. A. 832; *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415; *National Bank of Newburg v. Smith*, 66 N. Y. 271, 23 Am. Rep. 48; *Bacon's Admr. v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576; *Houston v. Braden* (Tex. Civ. App.), 37 S. W. 467; *Citizens' Bank v. Elliott*, 9 Kan. App. 797, 59 Pac. 1102. The only case to the contrary which we have found is *McDowell v. Bank of Wilmington & Brandywine*, 1 Harr. (Del.) 369.

Let us examine the grounds upon which courts have based decisions discharging a surety when the bank holding the note fails, upon its maturity, to pay it from funds of the maker which it then holds on general deposit, which are sufficient for this purpose. All of the courts which have dealt with the question seem to recognize the right of the bank to set off the amount due it upon a note by one of its depositors against its indebtedness, on general deposit account, to such depositor, whether such indebtedness on its part exists at the time the note matures or is caused by deposits subsequently made. And it is upon this right to extinguish the note by applying thereto an amount of its general deposit indebtedness to the maker thereof, sufficient for the purpose, that most of the decisions ¹⁴⁰ in which sureties have been held to be discharged have been placed. Thus, in *Commercial Nat. Bank v. Henninger*, 105 Pa. 496. while it was held that the note in question, being made payable at the bank which held it, was equivalent to a draft or check upon the bank for the amount of the note, yet the court first undertook to demonstrate that the surety on the note was released because the bank had the right to set off the amount of the note against its general deposit indebtedness to the maker thereof, and this right it was bound to exercise for the protection of the surety. The court said: "The rule is well settled that 'when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged. It need not be actually in the hands of the creditor; if it be within his control, so that by the exercise of reasonable diligence he may have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged.'" In support of the ruling, the court used the following illustration: "If I am the holder of A's note, indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested and hold C as an indorser? It is true that A's note is not technically paid, but the right to setoff exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor, instead of the creditor of A. If this is so between individuals, why is it not so between the bank and individuals?" Under this argument and this principle, it is

quite clear that it would make no difference whether the note was made payable at the bank or not. In either case the bank would have the right of setoff, and its failure to exercise it would discharge the surety. And under the principle here announced we cannot see why it should make any difference whether the opportunity for the bank to protect the surety occurred at the precise time that the note matured or afterward. In so far as the decision in that case and the one in *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20, which followed it, and any decision rendered in another jurisdiction, may be based on the idea that a note payable at a particular bank is equivalent to a draft or check on that bank for its amount, it is not applicable to the case with which we are dealing; for in this case the note was not made payable at any bank at all. And we may say, in passing, that this construction of a note payable ¹⁴¹ at a bank, which obtains in a number of jurisdictions, is by no means generally accepted by the courts, but has met with vigorous protest: *Grissom v. Commercial Bank*, 87 Tenn. 350, 10 Am. St. Rep. 669, 10 S. W. 774, 3 L. R. A. 273; *Wood v. Merchants' Trust Co.*, 41 Ill. 267; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Scott v. Shirk*, 60 Ind. 160; *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep. 239; *Gordon v. Muchler*, 34 La. Ann. 604. In so far as the decisions in these Pennsylvania cases, and the other cases wherein a surety on a note owned by a bank has been held to have been discharged by the failure of the bank, upon the maturity of the note, to charge the amount thereof against the deposit account of the principal obligor, rest upon the principle that the bank was bound, for the protection of the surety, to exercise its right of setoff against the principal, we fail to see any rational distinction between them and the cases in which it has been held that a surety is not discharged by the failure of the bank to apply deposits of the principal debtor made subsequently to the maturity of the note to its payment. For, as it is generally held that the bank has the right of setoff in either instance, it would seem that if its neglect to exercise it in the one instance would discharge the surety, its failure to exercise it in the other would likewise do so. And yet, as will be seen from cases cited above, the same courts which hold a surety discharged if the amount of the deposit of the

maker of the note, at its maturity, is sufficient to pay it, and the bank fails to avail itself of its right of setoff, also hold that a failure by the bank to apply general deposits made by the maker subsequently to the maturity of the note to its payment will not discharge the surety. For instance, it was held in *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126, that "Where at the maturity of a note held by a bank the maker's balance on deposit in said bank was insufficient to pay the note, which was protested for nonpayment, the bank is not bound, for the protection of the indorser, to apply the maker's subsequent deposits to the payment of the note, although they were sufficient for that purpose." In the opinion it was said: "While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and, therefore, in an action by the bank against the depositor, on a note upon which he is liable, the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an indorser of the depositor. A bank deposit is different from an ordinary debt in this, ¹⁴² that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand. The convenience of the commercial world, the enormous amount of transactions by means of bank checks, occurring every business day in all parts of the country, require that the greatest facilities should be afforded for the use of bank deposits by means of checks drawn against them. The free use of checks for commercial purposes would be greatly impaired if the banks could only honor them on peril of relieving indorsers, without an investigation of the state of the depositor's liabilities on discounted paper. . . . It is beyond question that the bank, in the absence of any special appropriation of the deposit by the depositor, would have the right to apply a general deposit to any existing matured indebtedness of the depositor. But that privilege is a right which the bank may or may not exercise in its discretion. . . . We fully recognize the rule that where a principal creditor has the means of satisfaction actually or potentially within his grasp, he must retain them for the benefit of the surety, but we regard the case of bank deposits as an exception to the rule." Most of this language of the Pennsylvania court was approvingly quoted, and the views therein set forth

were followed, by the Kansas court in *Citizens' Bank v. Elliott*, 9 Kan. App. 797, 59 Pac. 1102, and by the Texas court in *Houston v. Braden* (Tex. Civ. App.), 37 S. W. 467. Again, in *First Nat. Bank of Lock Haven v. Peltz*, 176 Pa. 513, 53 Am. St. Rep. 686, 35 Atl. 218, 36 L. R. A. 832, it was held: "While a bank which is a holder of a promissory note and has on deposit at the time of maturity to the credit of any party liable to it on the note a sum sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not in general bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity of the party—usually the indorser—to have the payment enforced against the depositor as the one primarily liable. In these cases the deposit must be sufficient at the time of the maturity of the note, it must not have been previously appropriated to any other use, and it must be to the credit of the party primarily liable." In the opinion the court said that though the title to money deposited passes to the bank, "yet the whole business of banking is founded on the faith of the immediate availability of the deposit, as money, for the use of the depositor, and any rule that interfered with the freedom of action of either bank or customer, ¹⁴³ by compelling a stop of their dealings with each other to examine the relations of other parties to the deposit, would go far toward destroying that instant convertibility which is the essence of the business. We do not think it desirable to go beyond the line already marked by the authorities." In the case with which the court was dealing it appeared that the party claiming to have been released by the conduct of the bank was a mere accommodation surety for the payee of the note, who had procured the bank to discount it, and he offered to prove that six days after the maturity of the note and at other times thereafter the bank had a balance to the credit of such payee sufficient to pay the note, and allowed him to check it out, although it knew at the time it did so of the fact of such suretyship. Yet it was held, for the reasons stated in the opinion, that the evidence offered "was incompetent and irrelevant." So both the ruling, as applied to the facts, and the opinion in the case show that the court realized the necessity of putting a rigid and, as it

seems to us, an arbitrary, limitation upon the broad principle which has been applied in the cases in which a surety upon a note owned by a bank has been held to have been discharged by the failure of the bank to exercise its right of setoff against the party primarily liable thereon. The broad principle to which we refer and which has been invoked in such cases is, that when the creditor has the means of satisfying the debt actually or potentially within his control, he must retain them for the benefit of the surety. If this principle applies at all to deposits of money in a bank, it is difficult to see why it should be rigidly limited to deposits held by the bank at the time the depositor's debt to the bank matures; for if the means of satisfaction can be said to be within the control of the bank then, they would seem to be equally within its control when the deposits are made after the debt has matured. It has been said by an able and often quoted text-writer that "if the bank at the maturity of a note held by it holds funds that, by a scratch of a pen, it could apply upon the note, thus securing itself, it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral designated for the purpose of securing the note": 2 Morse on Banks and Banking, 956. This argument applies as well to a case in which the opportunity to protect the surety, "by a scratch of a pen," occurs after the maturity of the note as it does to a case in which such opportunity presents ¹⁴⁴ itself at the time when the note falls due. We do not overlook the fact that it has been said, in a case wherein the party claiming to have been discharged was an indorser, that the liability of an indorser becomes fixed when the note, at maturity, is protested for nonpayment. But we do not understand that this strips him of the right to be protected, as a surety, against subsequent acts of the creditor which will injure him, or increase his risk. "It is true that there is a distinction between an ordinary indorser and one who is merely a surety, but a contract of suretyship is necessarily included in every unqualified indorsement of a negotiable instrument . . . and the principle which protects sureties from any act of the creditor tending to injure the surety, or increase his risk, is applicable as well to indorsers for value as those whose indorsement is for accommodation merely": *Tanner v. Gude*, 100 Ga. 157, 27 S. E. 938. So we

fail to see why, even in cases involving the rights of an ordinary indorser, there should be a distinction made based upon the mere question as to the time when the bank had the opportunity to protect the surety by subjecting the deposit account of the principal to the payment of the debt. In our opinion, as we have already indicated, there is a direct conflict in principle between the decisions which hold the surety discharged because the bank at the maturity of the note could have protected him by recourse to the deposit of the principal, and failed to do so, and those which hold that the surety is not discharged by the failure of the bank to exercise its right of setoff against the deposits made subsequently to the maturity of the debt; and we think that the better view of the question is that taken in the latter class of cases.

One ground upon which it has been held that a surety upon a note held by a bank is discharged, if, at the maturity thereof, the bank holds on general deposit for the maker a sum sufficient to pay the note, which it permits to be checked out, is that the bank has a lien upon such deposit of the principal debtor to the extent of its claim against him, and ought, in justice to the surety, to enforce it for his protection: Zane on Banks and Banking, sec. 114; Sheldon on Subrogation, sec. 124, and cases cited. We do not see how a bank has a lien upon the general deposit account of its debtor to secure his indebtedness to it. When money is deposited in a bank upon general deposit account, it ceases to be the money of the depositor and becomes the absolute property of the bank, and ¹⁴⁵ the relation between the bank and the depositor is that of debtor and creditor, the bank becoming indebted to the depositor in the amount of his deposit, and the debt being payable when, and in such amounts thereof, as the creditor may, by written order or check, demand. A general deposit of money in a bank "is a loan, and transforms the funds from ready money into a chose in action": Ricks v. Broyles, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772; Morse on Banks and Banking, 30, 42; Newmark on Bank Deposits, sec. 105. As the bank holds no funds or property of the depositor, but is merely his debtor in a given amount, how can it be said the bank has a lien upon the deposit to secure its claim against the depositor? Let us state this lien proposition. Smith owes the bank and

the bank owes him, each has a chose in action against the other, and to secure the payment of its claim against Smith, the bank has a lien upon the chose in action which he holds against it. We fail to see how one can hold a lien upon his own indebtedness to another, upon a mere chose in action which the other holds against him. Again, if a bank which holds a note against one of its depositors has a lien upon his deposit account, to secure the payment of the note, it would seem that the bank, before the maturity of the note, would have the right to assert this lien against deposits made with it by him prior to the maturity of the debt, by refusing to honor his checks whenever by so honoring the amount of his deposit account would be reduced to a sum less than the amount of the note. We do not think any court would hold that the bank could do this. And yet this would seem to be the logical effect of holding that the bank has a lien upon the deposit account; and the only escape from this conclusion would be to hold that the lien of the bank comes into existence only at the moment that the debt against the depositor matures. Besides, if the theory of a lien applies to a deposit on hand when the debt falls due, why does it not also apply to a deposit subsequently made, as in either case the right of the bank to set off what the depositor owes it against the deposit exists? The Kentucky court of appeals, in *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W., 203. recognized that the discharge of a surety in a case like this could not be placed upon the release by the bank of a lien which it had to secure the debt. In the opinion in that case it is said: "Now, while it is true that the bank in this case had not, strictly speaking, a lien upon any money or property belonging to Hurst, ¹⁴⁶ and while the surety could not, perhaps, by paying this debt to the bank, have become entitled to demand of it repayment out of Hurst's deposit, which is laid down by some of the authorities as the true test, yet it seems to us that this bank, by the voluntary surrender to the principal of money more than sufficient to pay this debt, and which, it is conceded, it had a right to apply to that purpose, has been equally reckless of the interests of this surety as though it had surrendered a security on which it had a specific lien." When a bank which holds a note against one of its depositors charges it up against the

depositor on his deposit account and marks the note paid, it is not availing itself of any lien against funds of the depositor in its hands, but is availing itself of a right, which has been pretty generally recognized, to set off against its indebtedness to the depositor the amount of his indebtedness to it. In our opinion, this is a right which it may exercise for its own protection, but which it is not bound to exercise for the protection of a surety upon the note, unless it knows that the depositor principal is insolvent, in which case it seems that the bank would be bound to protect the surety: *Walsh v. Colquitt*, 64 Ga. 740. If the bank, in the absence of knowledge of insolvency on the part of the depositor, fails to exercise its right of setoff, and allows him to check out his deposit, we do not see how a surety upon the note of the depositor has been legally injured, or exposed to greater liability, or has had his risk increased. Its nonexercise of its right of setoff interferes with no right of subrogation which the surety would have upon payment of the note; for by paying the note he could not, under the right of subrogation, reach the indebtedness of the bank to the principal. The bank, by merely owing the principal upon the note, held neither collateral nor lien to secure the note, and nothing whatever to which the surety, upon payment of the note, could, by subrogation, resort for the purpose of reimbursement. How, then, can it be said that the surety has been, in a legal sense, injured by the conduct of the bank in paying the debt which it owed the principal, instead of setting off against it the debt which he owed it?

In *Hollingsworth v. Tanner*, 44 Ga. 11, it was held that although the owner of judgments against a principal and surety had, while owning the judgments, employed the principal to perform certain services for him at a stipulated price, and when the services were rendered had paid the principal therefor, and still held the judgments ¹⁴⁷unsettled, the surety was not discharged. In the opinion Chief Justice Lochrane said: "The decision of this court in *Curren v. Colbert*, 3 Kelly, 239, 46 Am. Dec. 427, is invoked to sustain the doctrine, that any act of the holder which increases the risk of the surety will discharge the surety. That case was the dismissal of a levy and the release of the property of the principal, levied on by a creditor having a judgment against the principal and surety, without privity of the

surety. But the doctrine is clearly recognized as settled in the books that mere indulgence, unless given upon a new and distinct consideration, or unless given under such a binding obligation as precludes the creditor from pursuing his remedy on the debt, will not discharge the surety." In *Echols v. Head*, 68 Ga. 152, it was held that, as there is no vendor's lien in Georgia, and the right to attach for purchase money is a privilege and not a lien, the fact that the vendor of a horse, for the purchase money of which he had taken a note with personal security thereon, subsequently bought the horse back from the vendee, and thereby destroyed his right to attach the property for the purchase money, did not discharge the surety on the note. It will be observed that the ruling in each of these Georgia cases is opposed to the idea that a creditor is bound, for the protection of a surety, to avail himself of any and every means which he may have for the protection of himself. He is not bound to preserve his right to set off a debt due him, whereon there is a surety, against a debt which he may owe his principal debtor, in order to protect the interests of the surety. Nor is he bound, for the sake of the surety, to preserve a remedy which he may have against the principal debtor, of which the surety could not, upon payment of the debt, avail himself. In *Lumsden v. Leonard*, 55 Ga. 374, it was held that the neglect of a judgment creditor for four years to levy upon real estate sold by the principal debtor to a purchaser, who held possession until the land was discharged from the lien of the judgment, did not discharge the surety, though such real estate was sufficient to satisfy the judgment, there being no proof, or offer to prove, that the judgment creditor was notified in writing to levy, and no tender of expenses by the surety. This ruling was placed upon the ground that "Mere nonaction by the creditor will not release the surety, unless such nonaction makes unproductive some collateral security, such as a mortgage, or is based upon a consideration paid by the principal¹⁴⁸ debtor to the creditor, or he is notified under the statute to collect the debt." In the opinion, Jackson, J., said: "On a careful examination of our own decisions since the organization of this court, and of the law in general, upon this subject, we conclude that the true doctrine to be gathered from all the sources at our command is this (and it

is embodied in our code): Some act must be done by the creditor, either before or after judgment, which injures the surety in some way; mere failure or negligence on the part of the creditor will not relieve the surety. And the exceptions to this general rule will be found where the creditor omits to do something by which collateral security in his hands is made unproductive, or where he is notified under the statute to proceed, and he fails or refuses; and if the letter of the statute on the subject of notice be extended to embrace proceedings after judgment, we think the security, in addition to the notice, should at least indemnify the creditor against the expenses of litigation."

In *Glazier v. Douglass*, 32 Conn. 393, "The plaintiff held a promissory note [payable at a bank] indorsed by the defendant for the accommodation of the makers, which had been protested for nonpayment, the makers having become, and still remaining, insolvent. A firm of which the plaintiff was a member owed the makers a larger sum than the amount of the note, against which, if sued, they could by statute have set off the claim held by the plaintiff. Without requiring such application the firm paid the makers the amount owed them, with full knowledge on the part of the plaintiff of all the facts." It was held, "in an action brought against the defendant on his indorsement, that he was not discharged by the neglect of the plaintiff to secure an application of the debt of the firm to the payment of the note." This ruling was based upon the principle that "the security, the discharge of which by a creditor will release a surety, must be a mortgage, pledge, or lien—some right to or interest in property which the creditor can hold in trust for the surety and to which the surety if he pay the debt can be subrogated; and the right to apply or hold must exist and be absolute." In the opinion the court said: "By a series of decisions adopting the equitable principles of the civil law, there have been annexed to the undertaking of a surety, in a case like this, three conditions; and if either is broken by the creditor, that undertaking becomes inoperative, and the surety is discharged. ¹⁴⁹ The first is that the creditor shall present the note to the maker at maturity, and if dishonored use due diligence in giving notice to the surety. The second is that no obligatory extension of time of payment shall be given which will preclude

the surety, if he pay the note to the creditor, from enforcing immediate payment by compulsory process from the principal debtor. And the third is, that the creditor shall apply in payment of the debt, or hold in trust for the benefit of the surety, all securities which he may receive or procure for that purpose by contract or operation of law, so that if compelled to discharge the debt the surety may be subrogated to them. . . . But although in some special cases in equity the creditor may be compelled to proceed against the maker, the law annexes no condition requiring the creditor to proceed against the principal debtor, or do any act (whatever his opportunity or however much it may subserve the interest of the surety) to procure security or enforce payment from the principal; and he may remain entirely passive and rely on the undertaking of the surety, whether the principal be solvent or insolvent. In respect to what shall be deemed a security within the meaning of the condition, there has been some contrariety of decision. The better opinion is that it must be a mortgage, pledge or lien—some right to or interest in property which the creditor can hold in trust for the surety, and to which the surety if he pay the debt can be subrogated, and the right to apply or hold must exist and be absolute. . . . The contrariety of decision spoken of has been chiefly in respect to liens obtained by process or operation of law. Judgment liens, made such by the local law, are assignable, and clearly within the condition. But it has been made a question whether a lien obtained by levy of execution on the goods of the principal debtor can be released or abandoned, and the better opinion now is that it cannot be.” In *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep. 239, the bank brought a suit upon a promissory note against Hill, Mote and Hair. Mote and Hair filed a joint answer, in which they alleged that they signed the note as sureties for Hill, who was the principal therein, which fact was known to the bank at the time that the note was given to it for money borrowed by Hill; that after the maturity of the note Hill made general deposits in the bank in sums exceeding the amount due on the note, and after the note became due the bank had of the funds of Hill on deposit more ¹⁵⁰ than enough to pay the note, and, except as to a small amount which was stated, it failed to apply any of the funds of Hill which it held on

deposit to the payment of the note, and suffered him to check out his funds, although prior to the maturity of the note Hill "had consented and directed the [bank] to allow and pay said note, interest, etc., thereon at any time after its maturity, out of his deposits in said bank, if he should have any such funds in said bank to pay the same or any part thereof." The plaintiff demurred to this answer, and the trial court overruled the demurrer, which ruling was reversed by the supreme court of the state. In the opinion the court said: "Though the funds deposited with the plaintiff might have been applied by it to the payment of the note in suit, the bank did not hold the funds, in any sense, in trust for the sureties of Hill on the note. Had Mote and Hair, as such sureties, paid to the appellant the note in suit, they could not, had the bank at the time been indebted to Hill on his deposit account in a sum exceeding the amount paid on the note, have required the bank to apply such indebtedness for their benefit, or to reimburse them for the money paid by them on the note for Hill's benefit. They could not have required this of the bank, for the obvious reason that they could not have, under the circumstances, any right to, or interest in, the debt due from the bank to Hill. . . . The question is not what a creditor might or could have done, but was he obliged to do this or discharge the surety? The creditor might sue the principal debtor as soon as the debt matured, and thereby save the surety from future hazard, but he is not obliged to sue. He may delay the collection of his debt until the principal debtor fails, without discharging the surety. To hold that the bank was obliged to apply deposits made by Hill to the payment of the note would be to compel him to collect his debt, though none of the parties bound to pay it had requested him to do so." In the case with which we are dealing there was a request by the surety for the creditor to collect the debt; but we know of no request which compels the creditor to proceed to do this, except the written notice from the surety to the creditor to sue, provided for by our statute.

In *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415, the supreme court of Illinois said: "The note appears to have been made for Michelson's benefit, and Voss to have been only a surety, as between himself and Michel-

son, and, as Michelson is shown to have had funds ¹⁵¹ on deposit in the bank, from time to time, after the maturity of the note, and before the bringing of the suit, to an amount exceeding that of the note, it is insisted that the bank was bound to apply such funds to the payment of the note, and that, not having done so, Voss is discharged. And the case of McDowell v. Bank of Wilmington and Brandywine, 1 Harr. (Del.) 369, and Law v. East India Co., 4 Ves. 825, are cited as authorities that, under such circumstances, a surety will be discharged. Without remark upon or consideration of these authorities, we do not regard them as having application to the case in hand. We do not recognize, in such a case as is here presented, the existence of any such obligation as the one which is asserted by appellant's counsel." In National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368, Chief Justice Gray well said: "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely the debtor of the depositor in an equal amount. [Citing cases.] So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterward insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in Baker v. Briggs, 8 Pick. 122, 19 Am. Dec. 311, American Bank v. Baker, 4 Met. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a setoff, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be

so made as to benefit the surety." We do not think that what the plea alleged occurred between the president of the bank and the surety renders a different principle applicable in the present case. ¹⁵² If the bank was, as we have seen, under no legal duty to the surety to set off the amount which the principal upon the notes owed it against the amount which it owed him upon his general deposit account, it was not bound to do this upon a mere request or demand of the surety that this should be done. It is provided by statute in this state that a surety may, at any time after the debt on which he is liable becomes due, give notice to the creditor to proceed to collect the same out of the principal, and that if the creditor fails or refuses to commence action for the space of three months after such notice, the surety will be discharged: Civ. Code, sec. 2974. This is the only notice from a surety to the creditor holding the obligation for which our law provides. It is true that there are decisions which hold that where a surety has requested the creditor to take action for the collection of the debt, which, if taken, would result in its collection from the property of the principal, and the creditor assures the surety that he will do so, and thus induces the surety to forego any means of indemnity or protection to which he might otherwise have resorted, and the creditor fails to redeem his promise, whereby the surety is injured, the surety is released. *Bulard v. Ledbetter*, 59 Ga. 109, is a case of this character. But in such cases it is not the mere failure of the creditor to comply with the verbal request of the surety, but his failure to comply with a promise which he made to the surety, and upon which the latter relied to his injury, which discharges the surety. Here there was no promise by the creditor which put the surety to sleep, but, on the contrary, the surety knew that the creditor did not intend to comply with his demand. Of course the mere indulgence, without consideration, of the principal debtor did not discharge the surety. The decision rendered in *Walsh v. Colquitt*, 64 Ga. 740, might have required a different conclusion in the present case, if the plea here had alleged that at the time the bank allowed Lipscomb to check out the whole of his deposit he was insolvent and the bank knew it, or that the bank, in addition to knowing the use for which he checked out the money, knew that by so using it he would be rendered insolvent.

The judgment of the court, sustaining the motion to strike the plea, was not erroneous, and as this left the defendant without any issuable defense filed under oath, it was proper for the court ¹⁵³ to render judgment in favor of the plaintiff for the amount due upon the notes.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

WHAT DUTY, IF ANY, A CREDITOR OWES TO A SURETY.

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I. Scope of Note.

In this note we shall include only those cases tending to illustrate the active, as distinguished from the passive, duties of the creditor toward the surety. We shall exclude from our consideration those cases discussing the release or discharge of the surety by reason of acts prohibited by the contract of suretyship itself or by reason of acts done by the principal.

II. Extent of Duty of Creditor to Attempt the Collection of the Debt or Obligation by Suit or Otherwise.

a. In General.—A creditor is not bound to sue on a bond when due under penalty of discharging the surety therein: *Thursby v. Gray's Admr.*, 4 Yeates, 518. The payee of an instrument having

a principal obligor and surety owes no duty of active vigilance to the surety to enforce the collection of the indebtedness arising from the obligation, since the surety at any time after default of the principal is entitled to pay the debt and reimburse himself by enforcing it against the principal and his cosureties, if he have any: *Levy v. Wagner*, 29 Tex. Civ. App. 98, 69 S. W. 112; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 105 N. W. 1056, 4 L. R. A., N. S., 666; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577. In *Eyre v. Everett*, 2 Russ. Ch. 381, a case in which the question of the failure of the creditor to sue upon the debt for over five years was urged as a defense by the surety, Lord Eldon observed: "The case, therefore, presents nothing more than the passive act of the obligees not suing. But the surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing."

And the mere fact that the payee of a note failed to sue the maker thereon while the maker was solvent, and by his passivity in that respect allowed the maker to become insolvent, does not exonerate a surety on the note from his liability to pay the note: *Burge v. Duden*, 105 Mo. App. 8, 78 S. W. 653.

b. Duty to Present Claim Against Estate of a Deceased or Bankrupt Principal.—The failure of the creditor to present his claim against the estate of the principal debtor does not operate as a discharge of the surety: *Winter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Johnson v. Planters' Bank*, 4 Smedes & M. 165, 43 Am. Dec. 480. In *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395, the court, in discussing the subject, said: "When the principal debtor in an obligation, to which there are sureties, dies, the payee may look to the sureties as primarily liable to perform the contract, and need not present the claim to the administrator of the deceased principal for allowance and payment: *Scantlin v. Kemp*, 34 Tex. 388; *Ray v. Breuner*, 12 Kan. 105; *People v. White*, 11 Ill. 341; *McBrown v. Governor*, 6 Port. 32; *Minter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102; *Vredenburg v. Snyder*, 6 Iowa, 39; *Johnson v. Planters' Bank*, 4 Smedes & M. 165, 43 Am. Dec. 480; *Boardman v. Paige*, 11 N. H. 431.

"But it is claimed that the failure to institute suit within ninety days after the rejection by the administrator of Morrison barred the action by Willis and Brother against the estate, and, since Willis and Brother could not recover against the estate of Morrison, the sureties of Morrison were also discharged from further liability upon the judgment.

"Although the debt may be barred by limitation as against the principal, yet judgment may be entered against the surety if he be liable thereon—in cases where suit may be maintained against the surety without joining the principal—and if the surety pay the debt which is at the time barred by limitations as against the principal, but is a valid obligation against the surety, such surety may recover against the principal, or against his estate in case of his death. The right of action in favor of the surety arises when he pays the debt, and is not based upon the original debt itself, but upon the implied contract which exists by law between the principal and surety in such cases: *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; *Reeves v. Pullian*, 7 Baxt. 119; *Maxey v. Carter*, 10 Yerg. 521; *Marshall v. Hudson*, 9 Yerg. 57; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Crosby v. Wyatt*, 23 Me. 156; *Wood v. Leland*, 1 Met. 387.

"In support of a contrary proposition the defendant in error cites the following authorities: *State v. Blake*, 2 Ohio St. 147, *Dorsey v. Wayman*, 6 Gill, 59, and *Auchampaugh v. Schmidt*, 70 Iowa, 642, 59 Am. Rep. 459, 27 N. W. 805. The authorities cited fairly support the contention of the defendant in error upon this question, but the overwhelming weight of authority, as well as sound reasoning, are against his contention. The proposition that the surety is discharged when the right of action is barred as against the principal rests upon the doctrine that the surety's action is based upon the right of subrogation to the claim of the payee in the contract, against which doctrine this court has held, in the case of *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528, after a careful review of the authorities on the question.

"Defendant in error urges upon this court that, although it be held that the plaintiffs in error were not bound to present the claim to Morrison's administrator, yet, having done so, and having failed to establish the claim as required by law, the sureties are, by such failure, discharged. If the failure of Willis and Brother to sue upon their claim within ninety days, or the fact that, having sued subsequently, they were defeated upon that claim for the reason that their right is barred by the lapse of ninety days' time, had the effect to discharge the estate of Morrison from liability to the sureties, then it would follow that the sureties would be discharged from a claim against them by Willis and Brother. But a discharge of the administrator of Morrison's estate upon that ground will not have the effect to discharge the estate from liability to Chowning, in case he was compelled to pay the debt; therefore, Chowning has suffered no injury by the failure of Willis and Brother to institute suit upon their claim within the time prescribed by law, nor by their failure to recover judgment against Morrison's estate when suit was instituted, and Chowning was not discharged by the bar of ninety

days' limitation in favor of the estate: *Marshall v. Hudson*, 9 Yerg. 57. In the case last cited, a suit was instituted against the administrator of the principal debtor, and against which the administrator pleaded the statutes of limitation and was discharged. Suit was afterward instituted against the surety, who pleaded that the debt was barred as to the estate of the principal, and also the judgment in favor of the estate, claiming that it discharged him, but the court gave judgment against him. The surety paid the judgment and brought suit against the estate of the deceased principal to recover the amount. It was claimed, as in this case, that, the debt being barred against the principal, the surety could not recover because he had discharged no obligation which rested upon the estate of the principal, but the court held that the surety was entitled to recover upon the implied obligation which arose under the law out of the relation of principal and surety."

But the voluntary release of the estate of the principal debtor has the effect of releasing his surety from personal liability and the failure to present a claim against it within the time fixed for the allowance and presentation of claims amounts to a release of the claim, where the estate is sufficient to pay all claims against it: *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441, 67 N. W. 803.

The payee of a bankrupt's note owes no duty to the surety of such note to prove the debt as a claim in the bankruptcy court. Mere delay and passivity on the part of the creditor does not discharge the surety. Besides, the surety has his own efficient and appropriate remedies: *Levy v. Wagner*, 29 Tex. Civ. App. 98, 69 S. W. 112.

c. General Effect of Delay in Suing Upon the Principal Obligation. Inasmuch as the surety has the right to pay the debt or satisfy the obligation, and then bring his own action against the principal, or, in some cases, proceeding in equity or under the statutes of some of the states to compel the principal to pay the debt or discharge the obligation, he is not allowed to demand from the creditor any greater degree of diligence in the collection of the debt or the enforcement of the obligation than is required in cases in which the relation of principal and surety does not exist. Hence, the general rule is that the mere forbearance of a creditor to sue upon the principal obligation or debt does not discharge the surety. Or, in other words, the creditor is under no active duty to sue the principal debtor: *Hooks v. Branch Bank*, 8 Ala. 580; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Humphreys v. Crane*, 5 Cal. 173; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Moreland v. State Bank*, 1 Ill. 263; *Naylor v. Moody*, 3 Blackf. 92; *Kirby v. Studebaker*, 15 Ind. 45; *Holdeman v. Woodward*, 22 Kan. 734; *Pharr v. McHugh*, 32 La. Ann. 1280; *Purdy v. Forstall*, 45 La. Ann. 814, 13 South. 95; *Freeman's Bank v. Rollins*, 13 Me. 202; *Sasscer v. Young*, 6 Gill & J. 243; *Banks v. State*, 62 Md. 88; *Hunt v. Bridgham*, 2 Pick.

581, 13 Am. Dec. 458; *Allen v. Brown*, 124 Mass. 77; *Huey v. Pinney*, 5 Minn. 310 (Gil. 246); *Johnson v. Planters' Bank*, 4 Smedes & M. 165, 43 Am. Dec. 480; *Hawkins v. Ridenhour*, 13 Mo. 125; *Quillen v. Quigley*, 14 Nev. 215; *Morris Canal etc. Co. v. Van Vorst's Admx.*, 21 N. J. L. 100; *Schroepel v. Shaw*, 3 N. Y. 446; *Thompson v. Hall*, 45 Barb. 214; *Mutual Life Ins. Co. v. Davies*, 56 How. Pr. 440; *Carter v. Jones*, 40 N. C. 196, 49 Am. Dec. 425; *Neal v. Freeman*, 85 N. C. 441; *Dye v. Dye*, 21 Ohio St. 86, 8 Am. Rep. 40; *Thursby v. Gray's Admr.*, 4 Yeates, 518; *Richards v. Commonwealth*, 40 Pa. 146; *Appeal of Neal* (Pa.), 11 Atl. 636; *Edwards v. Dargan*, 30 S. C. 177, 8 S. E. 858; *Johnston v. Searcy*, 4 Yerg. 182; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842; *Crawn v. Commonwealth*, 84 Va. 282, 10 Am. St. Rep. 839, 4 S. E. 721; *Harris v. Newell*, 42 Wis. 687; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 105 N. W. 1056, 4 L. R. A., N. S., 666. But to the contrary effect are *Auchampaugh v. Schmidt*, 70 Iowa, 632, 59 Am. Rep. 459, 27 N. W. 805, and *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833, in which cases the court, proceeding upon the theory that when the statute of limitations has run against the principal debtor he is under no obligation to preserve the evidences of his defense against the principal obligation, reasoned that the same rule should apply to the surety.

The rule where the principal obligation is an unliquidated claim, such as the fidelity bond of a public officer, is that where the statute provides that actions for misfeasance in office are barred within a certain time, that the action against the surety will also be barred by the same period of limitations: *State v. Conway*, 18 Ohio, 234; *State v. Blake*, 2 Ohio St. 147.

d. Effect Where Creditor has been Requested by Surety to Sue upon the Obligation.—It is well settled that a surety may by a suit in equity, after the principal obligation becomes due, compel the creditor to collect the debt from the principal, provided, of course, that he indemnify the creditor against loss from an unsuccessful suit against the principal: *Rice v. Downing*, 12 B. Mon. 44; *Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442; *Huey v. Pinney*, 5 Minn. 310; *King v. Baldwin*, 2 Johns. Ch. 554; *Kent v. Matthews*, 12 Leigh, 573; *Hogaboom v. Herrick*, 4 Vt. 131; *Ranelagh v. Hays*, 1 Vern. 189; *Autrobus v. Davidson*, 3 Mer. 578; *Lee v. Rook*, Mos. 318; *Nesbet v. Smith*, 2 Bro. C. C. 579; *Rees v. Berrington*, 2 Ves. Jr. 543.

But it is not well settled whether the creditor is obliged to sue the principal upon the mere request of the surety to do so. The leading case holding that the failure of the creditor to so sue the principal upon request by the surety will exonerate the surety in the event that the principal thereafter becomes insolvent is that of *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415. The reasoning of the court in that case will show the contentions made by the

courts on both sides of this question. The court, after referring to *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369, which held the same doctrine as it was about to hold, but which had been overruled by Chancellor Kent in a very exhaustive opinion in *King v. Baldwin*, 2 Johns. Ch. 554, said: "The only point in which the chancellor and the supreme court differ is this: The chancellor maintains that the surety has no right, by an act in pais, to require the creditor to coerce the principal by suit to pay the debt, but he must apply to a court of equity, which will lend its aid for that purpose; whilst in the case decided in the supreme court, it is held that the creditor is bound to prosecute the principal at the request of the surety, and if he fail to do so, and the principal becomes insolvent afterward, so that the debt is lost as against him, the surety will be discharged. The chancellor considers it unnecessary and inexpedient to introduce what he considers a new principle of action between the creditor and surety; he apprehends that it will open a litigious inquiry as to the certainty and efficiency of the notice, and that such a weapon put into the hands of a surety affords a temptation to vexation and fraud.

"The principle adopted by this court in *Rathbone v. Warren*, 10 Johns. 587, that a surety will be discharged if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of the performance of a contract, although amply supported by cases decided in the English courts, is of modern growth even in a court of equity. And it is well settled now that this defense may be set up at law. Gibbs, C. J., says in *Orme v. Young*, Holt N. P. 84, 17 R. R. 611, that the principle is borrowed from a court of equity. Our system of jurisprudence is in a constant progress of improvement, and some of the most valuable principles have sprung up and attained their perfection within the recollection of many members of the bar. Many cases might be mentioned, but I will refer to that just and salutary rule that a court of law will take notice of and protect the rights of an assignee of a chose in action. I have witnessed the rise, progress and establishment of that wholesome and equitable principle. This, too, was borrowed from a court of equity. The soil into which it has been transplanted is congenial to its nature and perfection; it has saved much litigation and enormous costs.

"I do not, then, perceive any solid objection to a court of law taking cognizance of the matters forming the grounds of the appellant's relief because in such cases courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience require of him. Courts of equity, when they interpose to compel a creditor, at the instance of a surety, to sue the principal debtor, undoubtedly proceed on the sound and just principle that

it is the duty of the creditor to obtain payment, in the first instance, of the principal debtor, and not of the man who is a mere surety that the principal shall pay the debt. The doctrine is that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a court of chancery for his protection. In every such case a court of equity proceeds on a pre-existing equitable obligation, binding on the conscience of the creditor, to exert himself to obtain payment of the debt from the principal, who is regarded as the real debtor, and who ought to be coerced to pay the debt; and it must be the natural and necessary consequence that if the creditor, after an order or decree that he shall proceed at law to collect the debt of the principal, omits to do so, and thereafter the principal becomes insolvent, that the surety will be discharged.

"If this duty exists and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise by an act *in pais* and without the interposition of a court of equity. Upon an application to that court by the surety, if the facts were conceded, an order or decree that the creditor should prosecute the principal debtor would be a matter of course; the decree would operate as a mere declaration of the duty of the creditor, and unless his conscience was dead to a sense of moral duty, it would not stand in need of such an admonition. If we are at liberty, as I think we are, to regard the consequences of the contrary doctrine, that the surety must either pay the debt himself, or resort to a court of equity to coerce the creditor to proceed at law against the principal, we shall find abundant cause to adopt the principle of the decision in *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369. The delay and expense are serious evils; the debt itself may, and undoubtedly will, in many cases, be jeopardized and lost as regards the principal, and the surety will be exposed to the final payment with a vast accumulation of costs.

"The principal objection to the decision in *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369, is 'that it will open a litigious inquiry as to the certainty and efficiency of the notice.' This objection lies with equal force to all acts *in pais*, such as a demand of the goods in an action of trover, a demand of the maker of a note and notice of the nonpayment to the indorser, due demand and notice of nonpayment to the guarantor; so in a great variety of other cases the responsibilities of parties depend on acts *in pais*; and I cannot perceive any ground for alarm or apprehension as to the mode of proof, unless we are prepared to distrust *parol* evidence in all cases. The chancellor refers to the civil law in support of his opinion. It appears that Justinian altered the civil law, and gave to the surety an exception of discussion, by which he might require the creditor

to proceed in the first instance against the principal; but if the creditor does not proceed against the sureties before he has proceeded against the principal, he cannot be obliged to proceed against the principal until he thinks proper; and his forbearing to proceed against him does not eventually destroy his right of proceeding against the surety, however great the delay has been: 1 Pothier on Obligations, by Evans, 262-267. The civil law is evidently defective in not affording any process which should coerce the creditor to proceed against the principal, and the superiority of the English law is striking and manifest in this respect.

"My opinion rests on these principles, that the creditor is under an equitable obligation, and such is the essence of the contract, to obtain payment from the principal debtor and not from the surety, unless the principal is unable to pay the debt, and if the creditor unjustly and improperly collude with the principal to throw the debt on the surety, or after a full and explicit request by the surety to proceed at law to recover the debt of the principal, the creditor, from any improper motives, refuses and neglects to do so, and by such refusal and neglect the means of recovering the debt of the principal are lost, that then the surety is exonerated. This has been treated as a novel and alarming doctrine; but in my apprehension, it cannot alarm an honest or conscientious creditor; for where is the man who will boldly avow the unjust and immoral principle that after his debt has become due, and after he has been solicited by the surety to proceed and collect it by prosecuting both principal and surety, he will abstain from suing, with a view of favoring the principal and throwing the eventual loss on an innocent man, who from motives of friendship or humanity has become a surety?

"There is but a minute shade of difference between the opinion expressed by the chancellor and that of the supreme court in *Pain v. Packard*, Johns. 174, 7 Am. Dec. 369, and it is simply this: the chancellor holds that a court of equity must first be appealed to, to compel the creditor to sue at law, whereas the supreme court maintain that he can be required by the surety to sue, without the aid of a court of equity, and if I am right in supposing that there does exist a moral and equitable duty on the part of the creditor to collect his debt from the principal in the first instance and this must be so, or a court of equity could not interpose at all, then I maintain that a court of law may, without overleaping its just jurisdiction, and in analogy to several other cases in which they take notice of existing equities, not only take cognizance of the equity which requires a creditor to collect his debt from the real debtor; but they may apply the consequences of the refusal of the creditor to sue the principal, without which the principle itself would be of no value, by holding that the surety is discharged if the creditor will not do his duty and collect this debt, if he can, from the principal."

Among the cases following the rule that the surety will be exonerated where the creditor fails to sue the principal after a request by the surety may be found: *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Thompson v. Robinson*, 34 Ark. 44; *Martin v. Shekun*, 2 Colo. 614; *Ingals v. Sutliff*, 36 Kan. 444, 13 Pac. 828; *Manchester Iron Mfg. Co. v. Sweeting*, 10 Wend. 162; *Wheeler v. Benedict*, 36 Hun, 478; *Remsen v. Beekman*, 25 N. Y. 552; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Toles v. Adeo*, 84 N. Y. 222; *Grandall v. Mosten*, 24 App. Div. 547, 50 N. Y. Supp. 145; *De Caumont v. Rasines*, 38 App. Div. 153, 56 N. Y. Supp. 652; *Cope v. Smith*, 8 Serg. & R. 110, 11 Am. Dec. 582; *Hopkins v. Spurlock*, 2 Heisk. 152; *Thompson v. Watson*, 10 Yerg. 362.

But the principal must be solvent at the time that the surety makes the request: *Herrick v. Borst*, 4 Hill, 650; *Huffman v. Hulbert*, 13 Wend. 377; *Merritt v. Lincoln*, 21 Barb. 249. Among those cases holding that the creditor is under no obligation or duty to commence suit against the principal at the mere request of the surety are the following: *Taylor v. Beck*, 13 Ill. 376; *Leavitt v. Savage*, 16 Me. 72; *Frye v. Barker*, 4 Peck. 382; *Bellows v. Lovell*, 5 Pick. 307; *Adams Bank v. Anthony*, 18 Pick. 238; *Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Pintard v. Davis*, 20 N. J. L. 205; *Caston v. Dunlap*, Rich. Eq. Cas. 77, 23 Am. Dec. 194; *Harris v. Newell*, 42 Wis. 687.

In some of the states the statutes make it the duty of the creditor to commence suit against the principal after receiving a notice so to do from the surety: *Cochran v. Orr*, 94 Ind. 433; *Barnes v. Mowry*, 129 Ind. 568, 28 N. E. 535; *Piper v. Newcomer*, 25 Iowa, 221; *Shenandoah Nat. Bank v. Ayres*, 87 Iowa, 526, 54 N. W. 367; *Smith v. Clapton*, 48 Miss. 66; *Jaspar County v. Shanks*, 61 Mo. 332; *Updike's Admr. v. Lane*, 78 Va. 132; *Coleman v. Stone*, 85 Va. 386, 7 S. E. 241; *Gillilan v. Ludington*, 6 W. Va. 128.

e. **Effect Where Principal is Insolvent at Time of the Request to Sue, or Becomes so Thereafter.**—The creditor, even in those states where the rule prevails that a request on the part of the surety for him to sue the principal will exonerate the surety from liability, is not obliged to sue the principal where he is insolvent at the time of the request to sue: *Hartman v. Burlingame*, 9 Cal. 557; *Huffman v. Hurlburt*, 13 Wend. 377; *Herrick v. Borst*, 4 Hill, 650; *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Marsh v. Duncel*, 25 Hun, 167; *Bizzell v. Smith*, 17 N. C. 27. In some of the states where the matter is regulated by statute, the duty to sue is not affected by the question of the insolvency of the principal: *Overturf v. Martin*, 2 Ind. 507; *Graham v. Bush*, 73 Iowa, 451, 35 N. W. 518; *Meriden Silver Plate Co. v. Hory*, 44 Ohio St. 430, 7 N. E. 753.

Of course, where the principal was solvent at the time of the request and only becomes insolvent subsequently, the rule whether the creditor is nevertheless under the duty to sue him under penalty of

exonerating the surety is dependent upon the rule followed in the particular state with respect to whether the creditor is under a positive duty to sue the principal upon the mere request of the surety as shown in the preceding subdivision.

In order for the creditor to be under any obligation to sue the principal after a request so to do from the surety, it is essential that the notice to sue be couched in language which clearly and distinctly shows a request to sue, and not mere advice as to the propriety of such a course of action: *Savage's Admr. v. Carleton*, 33 Ala. 443; *Darby v. Bemey Nat. Bank*, 97 Ala. 643, 11 South. 881; *Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293; *Bowling v. Chambers*, 20 Colo. App. 113, 77 Pac. 16; *Kennedy v. Folde*, 4 Dak. 319, 29 N. W. 667; *Kaufman v. Wilson*, 29 Ind. 504; *Moore v. Peterson*, 64 Iowa, 423, 20 N. W. 744; *Lockridge v. Upton*, 24 Mo. 184; *Maier v. Canavan*, 57 How. Pr. 504; *Denick v. Hubbard*, 27 Hun, 347; *Goodwin v. Simonson*, 74 N. Y. 133; *Baker v. Kellogg*, 29 Ohio St. 663; *Fidler v. Hershey*, 90 Pa. 363; *Parrish v. Gray*, 1 Humph. 88.

III. Extent of Duty of Creditor to Give Surety Notice of Default of Principal.

The general rule is that the creditor is under no obligation to give the surety notice of the default of the principal in order to hold the surety liable, unless, of course, he has specifically agreed to do so in the contract of suretyship: *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 21; *Week v. Pugh*, 92 Ind. 382; *Phoenix Ins. Co. v. Findley*, 59 Iowa, 591, 13 N. W. 738; *Gilbert v. State Ins. Co.*, 3 Kan. App. 1, 44 Pac. 442; *Dougherty v. Peters*, 2 Rob. 534; *Forrester v. State*, 46 Md. 154; *Morris Canal etc. Co. v. Van Vorst's Admx.*, 21 N. J. L. 100; *Neal v. Freeman*, 85 N. C. 441; *Matthewson v. Sprague*, 1 B. L. 8; *Smith v. Martin*, 4 Desaus. 148; *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188. But where the creditor, by positive acts on his part, leads the surety to believe that the debt or obligation has been satisfied, and the surety, in consequence thereof, releases security held by him, or omits to secure himself against the default of the principal, the surety will be discharged: *High v. Cox*, 55 Ga. 662; *Scarratt v. F. W. Cook Brewing Co.*, 117 Ga. 181, 43 S. E. 413; *Thornburgh v. Madren*, 33 Iowa, 380; *West v. Brison*, 99 Mo. 684, 13 S. W. 95; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 18; *Atkins v. Payne*, 190 Pa. 5, 42 Atl. 378.

The question of the timeliness of the notice of default very frequently arises in respect to the liability of a surety on contractor's bonds, or on bonds for the fidelity of employes, but in such cases the duty of the obligee is generally fixed by the terms of the bond: *Getchell etc. Mfg. Co. v. National Surety Co.*, 124 Iowa, 617, 100 N. W. 556; *Hurley v. Fidelity etc. Deposit Co.*, 95 Mo. App. 88, 68 S. W. 958; *In re Byer's Estate*, 205 Pa. 66, 54 Atl. 492; *Dallas etc. Loan*

Assn. v. Thomas, 36 Tex. Civ. 268, 81 S. W. 1041; National Surety Co. v. Long, 125 Fed. 887.

IV. Effect Where Creditor Surrenders Securities or Funds Which were in His Possession.

a. **In General.**—It is the duty of the creditor, where he holds property of the principal in his possession as security for the principal obligation, not to release such property upon penalty of discharging the surety to the extent of the property so released. The position of the creditor under such circumstances is in the nature of that of a trustee for all the parties concerned: Cullum v. Emanuel, 1 Ala. 23, 34 Am. Dec. 757; Winston v. Yeargin, 50 Ala. 340; Stallings v. Bank of America, 59 Ga. 701; Kirkpatrick v. Howk, 80 Ill. 122; Holland v. Johnson, 51 Ind. 346; Sample v. Cochran, 82 Ind. 260; Bonney v. Bonney, 29 Iowa, 448; Lucas Co. v. Roberts, 49 Iowa, 159; Barrow v. Shields, 13 La. Ann. 57; Gay v. Blanchard, 32 La. Ann. 497; Springer v. Toothaker, 43 Me. 381, 69 Am. Dec. 66; Cummings v. Little, 45 Me. 183; American Bank v. Baker, 4 Met. 164; Guild v. Butler, 127 Mass. 386; Ives v. Bank of Lansingburg, 12 Mich. 361; Willis v. Davis, 3 Minn. 17; Nelson v. Munch, 28 Minn. 314, 9 N. W. 863; Taylor v. Jeter, 23 Mo. 244; Griswold v. Jackson, 2 Edw. Ch. 461; Third Nat. Bank v. Shields, 55 Hun, 274, 8 N. Y. Supp. 298; Smith v. McLeod, 38 N. C. 390; New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 655; Day v. Ramey, 40 Ohio St. 446; Brown v. Rathburn, 10 Or. 158; Clow v. Derby Coal Co., 98 Pa. 432; Templeton v. Shakley, 107 Pa. 370; Cherry v. Miller, 7 Lea, 305; Strong v. Wooster, 6 Vt. 536; Austin v. Belknap, 54 Vt. 495; Plankinton v. Gorman, 93 Wis. 560, 67 N. W. 1128; Allen v. O'Donald, 23 Fed. 573; Brown v. First Nat. Bank, 132 Fed. 450.

b. **Effect Where Creditor Makes Payments to Principal Which He had a Right to Withhold.**—A surety on a bond given as an indemnity against defective work under a construction contract can only be released by some positive act done by the owner to the prejudice of the surety, such as acceptance and payment with knowledge or some act which would imply connivance amounting to fraud: Newark v. New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294. Positive acts of negligence on the part of the creditor in making payments which he had the right under a building contract to withhold will in some cases release the surety: Hedrick v. Robbins, 30 Ind. App. 595, 66 N. E. 704.

c. **Duty of Creditor Where He has Property or Funds of the Principal in His Possession Such as Where a Bank is Creditor.**—Where money is deposited on condition that the creditor require it to be applied on his claim and he turns it over to the principal without the consent of the surety, the surety is discharged: Pierce v. Atwood, 64 Neb. 92, 89 N. W. 669. Hence the general rule is that where the

creditor has within his control funds of the principal debtor which may properly be applied toward the payment of the obligation, but fails to do so, the surety is discharged: *Dawson v. Real Estate Bank*, 5 Pike (Ark.), 283; *McDowell v. Bank of Wilmington etc.*, 1 Harr. 369; *Central Bank v. Thein*, 76 Hun, 571, 28 N. Y. Supp. 232; *Commercial Nat. Bank v. Henninger*, 105 Pa. 496; *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20; *Mechanics' Bank v. Seitz*, 150 Pa. 632, 30 Am. St. Rep. 853, 24 Atl. 356; *First N. Bank of Lockhaven v. Peltz*, 176 Pa. 513, 53 Am. St. Rep. 686, 36 L. R. A. 832, 35 Atl. 218.

But in order to make it incumbent upon the creditor to apply funds or property in his possession upon the debt of the principal, the creditor must have some such lien on or interest in the property or fund that it is charged with a trust in favor of the surety. The reasons for this rule were well set forth in the case of *Glazier v. Douglas*, 32 Conn. 393, the court saying: "By a series of decisions adopting the equitable principles of the civil law, there have been annexed to the undertaking of a surety in a case like this three conditions, and if either is broken by the creditor that undertaking becomes inoperative, and the surety is discharged.

"The first is that the creditor shall present the note to the maker for payment at maturity, and if dishonored use due diligence in giving notice to the surety. The second is that no obligatory extension of the time of payment shall be given which will preclude the surety, if he pay the note to the creditor, from enforcing immediate repayment by compulsory process from the principal debtor. And the third is, that the creditor shall apply in payment of the debt, or hold in trust for the benefit of the surety, all securities which he may receive or procure for that purpose by contract or operation of law, so that if compelled to discharge the debt the surety may be subrogated to them. And the surety may waive the benefit of these conditions by assent. But although in some special cases in equity the creditor may be compelled to proceed against the maker, the law annexes no condition requiring the creditor to proceed against the principal debtor, or do any act (whatever his opportunity or however much it may subserve the interest of the surety) to procure security or enforce payment from that principal; and he may remain entirely passive, and rely on the undertaking of the surety, whether the principal debtor be solvent or insolvent.

"In respect to what shall be deemed a security within the meaning of the condition, there has been some contrariety of decision. The better opinion is that it must be a mortgage, pledge or lien—some right to or interest in property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated, and the right to apply or hold must exist and be absolute,

"Mortgages and pledges made or given as security are, as a matter of course, within the condition. But even these may be received under such a qualified or contingent contract that they may be released. Thus in *Pearl Street Congregational Soc. v. Finlay*, 23 Conn. 10, a mortgage was given as security with the understanding that other security when offered should be received and the mortgage released, and this court held that the creditor could safely carry out the agreement and release the mortgage. The right to hold the security in that case was created by the agreement, and was contingent, not absolute, and the interest of the surety in it could be no greater than that of the creditor.

"The contrariety of decision spoken of has been chiefly in respect to liens by process or operation of law. Judgment liens made such by the local law are assignable, and clearly within the condition. But it has been made a question whether a lien obtained by levy of execution on the goods of the principal debtor can be released or abandoned, and the better opinion now is that it cannot be: *Mayhew v. Crickett*, 2 Swan, 185; *Commonwealth v. Vanderslice*, 8 Serg. & R. 452; *Chichester's Admr. v. Mason*, 7 Leigh, 244. In the last case execution was not levied, but the law made it a lien on all the defendants' goods as soon as issued.

"But it is otherwise in respect to liens acquired by attachment on *meane process*. As the creditor is under no obligation of active diligence, and therefore need not commence a suit whatever his opportunity, so if he commences one he is under no obligation to pursue it, for it involves trouble and expenses not required of him where goods are taken by the officer in execution: *Hurd v. Little*, 12 Mass. 502; *Bank of Montpelier v. Dixon*, 4 Vt. 587, 24 Am. Dec. 640; *Crane v. Stickles*, 15 Vt. 252; *Baker's Exrs. v. Marshall*, 16 Vt. 522, 42 Am. Dec. 528.

"Applying these principles to the case, it is clear that the defense is groundless. If it appeared from the finding that the plaintiff was individually indebted to Rogers & Co. for goods purchased of them after the note was given, that indebtedness, in the absence of any agreement to that effect, would not be a security in his hands, within the condition annexed by law to the defendant's undertaking. The plaintiff would have had no lien upon it and no right by contract or operation of law to apply it; nor would he hold the debt in trust for the benefit of the surety; nor if the defendant paid the note could he claim to be subrogated to it.

"The plaintiff could have retained it, and if sued could offset it, but that the defendant had no more right to insist he should do than to insist that he should do any other act to secure or enforce payment. The surety could have paid the note and attached the debt by foreign attachment.

"The defendant cites several dicta to the effect that 'where the creditor has the means of satisfaction actually or potentially in his hands

and releases them the surety is discharged.' The dicta were all made in cases where there was a lien, and the money or property held under a right of application. Thus, in the case in the 8th Pickering, 122, 19 Am. Dec. 311 (*Baker v. Briggs*), property had been assigned by the debtor in trust to pay the note, and the money was in the hands of the assignee subject to the call of the creditor, and Judge Parker said it was the same as if in his own hands, and as he had funds with the right to apply them, he could not call on the surety. There the right to apply was created by the assignment of the debtor and the money was strictly a security. In *Commonwealth v. Vanderslice*, 8 Serg. & R. 452, a lien had been acquired by the levy of execution on goods, and the dictum cited had reference to such a state of facts. In *Law v. East India Co.*, 4 Ves. 825, funds had been left in the hands of the creditor to pay the debt, and there was a right of application. In *Lichtenthaler v. Thompson*, 18 Serg. & R. 157, 15 Am. Dec. 581, the plaintiff was a lessor, and the defendant surety for the fulfillment of the lease, and the lessor had a lien by statute on the goods of the lessee which had been taken by another creditor in execution and sold, but his lien extended to the money which he fraudulently permitted a prior lessor to claim, and the court held the right to the money, a security which the plaintiff was bound to apply to the officer for and obtain. These and all the other cases from which the defendant cites are cases of lien, with right of application, and would not sustain the defense if the debt to *Roger & Co.* was the individual debt of the plaintiff."

The decisions with respect to whether a bank which is the payee of a note is obliged to retain the amount of the note from out of the deposit of the maker at the bank when the note becomes due are not harmonious. Where a deposit with the bank is a special one, such as, for instance, under an agreement that the depositor will buy cattle and check the money out in such transactions, it is held that the bank is under no duty to retain the deposit in order to protect the surety from loss: *Wilson v. Dawson*, 52 Ind. 513; *Neponset Bank v. Leland*, 5 Met. 259.

The diversity of opinion amongst the courts upon the question of the duty of a bank holding a note made by a depositor and signed by a surety is well shown in the principal case (*Davenport v. State Banking Co.*, 126 Ga. 136, ante, p. 68, 54 S. E. 977), wherein the court said: "It has been held in a number of cases that where a bank is the owner of a note or other obligation evidencing an indebtedness, upon which there is a surety, and at the maturity of the debt the principal debtor has funds on general deposit with the bank sufficient to pay the debt, the failure of the bank to apply such funds to its payment will discharge the surety: *Commercial Bank v. Henninger*, 105 Pa. 496; *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Am. St. Rep. 908, 21 Atl. 20; *Dawson v. Real Estate Bank*, 5 Pike (Ark.), 283;

Pursifull v. Pineville Banking Co., 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203; *Central Bank of Rochester v. Thein*, 76 Hun, 571, 28 N. Y. Supp. 232. The contrary view was taken in *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep. 239, *Martin v. Mechanics' Bank*, 6 Har. & J. 235, and *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368. For although in the Massachusetts case, and perhaps in each of the other two, the decisions might have been placed upon the narrow ground that it did not appear that at the maturity of the note the bank held on general deposit funds of the principal sufficient to pay it, in none of these cases was this done; but the decision in each case was placed upon the broad ground that the bank was not bound to set off the amount of a note due to it by a depositor against his general deposit account for the protection of a surety upon the note. It has been held by almost all the courts where the questions have arisen that, if at the maturity of a note held by a bank the principal thereon has not sufficient funds in general deposit with the bank to pay it, the bank is under no duty to a surety upon the note to apply such funds of the principal as may then be on deposit to the payment of the note pro tanto; nor is it bound to pay the note from subsequent deposits of the principal, although they are sufficient for this purpose: *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126; *First Nat. Bank of Lancaster v. Shreiner*, 110 Pa. 188, 20 Atl. 718; *First Nat. Bank of Lock Haven v. Peltz*, 176 Pa. 513, 53 Am. St. Rep. 686, 35 Atl. 218, 36 L. R. A. 832; *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415; *National Bank of Newburg v. Smith*, 66 N. Y. 271, 23 Am. Rep. 48; *Bacon's Admr. v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576; *Houston v. Braden* (Tex Civ. App.), 37 S. W. 467; *Citizens' Bank v. Elliott*, 9 Kan. App. 797, 59 Pac. 1102. The only case to the contrary which we have found is *McDowell v. Wilmington Bank*, 1 Harr. (Del.) 369."

If a bank at which a note is payable and to which it belongs had, when it became due, moneys of the maker on deposit more than sufficient to pay it, and, instead of applying the moneys to such payment, permitted them to be drawn out by the maker, who subsequently became insolvent, his surety on the note is thereby released: *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 53 Am. St. Rep. 409, 30 S. W. 203. In the case last cited, the court observed: "The right on part of this bank to retain a sufficiency of Hurst's deposit gave it the absolute control of an ample security for the payment of this debt. A lien by pledge could give no higher right to the security than this bank had. It had the unquestioned right to actually appropriate and apply this money, which it owed to Hurst, to the payment of Hurst's debt to it. It matters not whether the right to the security has its origin in the doctrine of setoff or under a pledge as collateral. It is the extent of the right to

the security, rather than the source from which that right springs, that should determine the question whether the creditor can voluntarily surrender the security without releasing the surety, and, having had in its hands a fund which it could, by mere exercise of its option to do so, have used for the satisfaction of this debt, and which, we may assume, the dictates of ordinary diligence and of prudent banking would have prompted it to thus use, this bank has, in our judgment, been guilty of bad faith toward the surety, who, according to the facts as they are admitted here, knew of this large deposit to the credit of his principal, who received no notice of the nonpayment of the note until nearly four years thereafter, and who assumed, as he had a right to do under these circumstances, that the note had been paid at maturity."

But a mere partial release of the maker's deposit account to the prejudice of the surety's equitable rights will not operate as a full discharge of the surety's obligation, though it may be so operated to the extent of the maker's deposit: *Lowe v. Reddan*, 123 Wis. 90, 100 N. W. 1038.

d. Duty of Creditor to Exercise Care and Diligence in the Management of Collateral Securities.—A creditor who receives securities as collateral to the principal obligation owes a duty to the surety to use proper care and diligence in the management and care of such securities. But he is not required to exercise any greater degree of care in regard to them than an ordinarily prudent man would exercise in protecting his own interests: *Sullivan v. State*, 59 Ark. 47, 26 S. W. 194; *Pfirshing v. Peterson*, 98 Ill. App. 70; *Crim v. Fleming*, 101 Ind. 154; *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621; *Mingus v. Dougherty*, 87 Iowa, 56, 43 Am. St. Rep. 354, 54 N. W. 66; *Jenkins v. National Bank*, 58 Me. 275; *Fennell v. McGowan*, 58 Miss. 261; *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816; *Burr v. Boyer*, 2 Neb. 265; *City Bank v. Young*, 43 N. H. 457; *Black River Bank v. Page*, 44 N. Y. 453; *Teaff v. Ross*, 1 Ohio St. 469; *Kemmerer v. Wilson*, 31 Pa. 110; *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601; *Douglas v. Reynolds*, 7 Pet. 113, 8 L. ed. 626. But after a mortgage or other lien in favor of the creditor has been made effective, the creditor is under no positive duty to foreclose the lien prior to the property subject to the lien becoming depreciated, since it is in the power of the surety to pay the debt and become subjected to the lien: *Grisard v. Henson*, 50 Ark. 229, 6 S. W. 906; *Carver v. Steele*, 116 Cal. 116, 58 Am. St. Rep. 156, 47 Pac. 1007; *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621; *Fuller v. Tomlinson*, 58 Iowa, 111, 12 N. W. 127; *Sheldon v. Williams*, 11 Neb. 272, 9 N. W. 86; *Schroepell v. Shaw*, 3 N. Y. 446; *Howe M. Co. v. Farington*, 82 N. Y. 121; *Appeal of Kindt*, 102 Pa. 441; *Day v. Elmore*, 4 Wis. 190. But a creditor who has a judgment lien upon the land of the principal debtor, which land is fairly worth in the mar-

ket enough to cover the principal obligation, releases the surety where he combines with the owner in selling it at private sale for less than it is worth: *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271, 34 Pac. 646. In other words, where the creditor is guilty of colluding with the principal debtor in such a manner as to waste the securities held by the creditor as collateral to the obligation, the surety may avail himself of that fact: *Phares v. Barbour*, 49 Ill. 370; *Robeson v. Roberts*, 20 Ind. 155, 83 Am. Dec. 308; *Nichols v. Burch*, 128 Ind. 324, 27 N. E. 737; *Clopton v. Spratt*, 52 Miss. 251; *Sitgreaves v. Farmers' Bank*, 49 Pa. 359.

V. Effect Where Creditor Loses Lien Secured by Levy of Execution Against Principal Debtor by His Own Negligence.

The effect of the loss of a lien secured by the levy of an execution upon the property of the principal debtor has been stated by the court of Maine to be as follows: "Although the plaintiff was not legally bound to use active diligence in collecting the debt of the principal, and the surety would not be discharged by reason of his delay in the matter, and though the plaintiff might have discontinued proceedings against the principal debtor which he need not have instituted, yet it would be clearly inequitable to allow him to abandon an absolute lien or security upon the property of the principal, which he had obtained as the result of those proceedings, and to retain his hold upon the security for the whole debt": *Springer v. Toothaker*, 43 Me. 381, 69 Am. Dec. 66.

The rule on this subject has been stated in *Freeman on Executions*, section 269, to be as follows: "When third persons, as sureties, are collaterally liable, the release of the levy cannot revive the judgment as to them; and in general, so far as the rights of third persons are concerned, whether they are sureties or the holders of junior liens, or otherwise interested in the discharge of the writ, the levy upon goods is a satisfaction of the judgment to the extent of their value, unless plaintiff is deprived of the benefit of his levy, without any fault, neglect or indulgence on his part, or on the part of the officer. If there are sureties for the payment of the debt for which the writ issued, its levy operates as a satisfaction in their behalf, of the benefit of which they cannot be deprived through the fault of the plaintiff or the officer. Hence, a release of the levy without their assent relieves them of their obligation as sureties, unless the release is without the concurrence of the plaintiff, as where it is accomplished by giving an undertaking on appeal, or a forthcoming and delivery bond."

VI. Effect Where Lien in Favor of Creditor is Lost by Operation of Law.

Where a lien secured by the creditor upon property of the principal debtor is lost by operation of law, the surety is discharged: *New-*

comb v. Raynor, 21 Wend. 108, 34 Am. Dec. 219; *Shutts v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231, 3 N. E. 588; *Wright v. Kuepper*, 1 Pa. 361; *Johnson v. Young*, 20 W. Va. 614. But the failure of the creditor to revive a judgment does not release a surety, in the absence of an express agreement that such judgment should be kept revived for his benefit: *Campbell v. Sherman*, 151 Pa. 70, 31 Am. St. Rep. 735, 25 Atl. 35.

HOLLOWAY v. HOLLOWAY.

[126 Ga. 459, 55 S. E. 191.]

DIVORCE—Moral Turpitude—Voluntary Manslaughter.—

Under a statute giving as a ground for divorce the conviction of either party of an offense involving moral turpitude, and under which he or she is sentenced to the penitentiary for a term of two years or longer, a wife becomes entitled to a divorce on her husband being convicted of voluntary manslaughter and sentenced to the penitentiary for a term of more than two years. (p. 103.)

DIVORCE FOR CRIME—Pardon, Effect of.—If a husband is convicted and sentenced for a crime entitling his wife to a divorce, his subsequent pardon by the governor does not destroy her right to such divorce. (p. 104.)

O. M. Duke and J. E. and L. B. McClelland, for the plaintiff in error.

J. D. Kilpatrick, contra.

COBB, P. J. Mittie D. Holloway brought her libel for divorce against Joseph Holloway on May 13, 1905, and alleged that they were married on December 24, 1893; in 1899 the respondent was convicted of the offense of voluntary manslaughter, and sentenced to serve a term of twenty years in the penitentiary; they have not lived together since the conviction of the respondent; in 1904 the respondent was pardoned by the governor. A demurrer to the libel was overruled, and the respondent excepted.

1. The Civil Code declares among the grounds for divorce, "the conviction of either party for an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the penitentiary for the term of two years or longer": Civ. Code, sec. 2426, par. 8. The respondent was sentenced to the penitentiary for a term exceeding two years, and the right of the libellant to a divorce depends

upon whether the offense of which he was convicted involved moral turpitude. Turpitude in its ordinary sense involves the idea of inherent baseness or vileness, shameful wickedness, depravity: Webster's International Dictionary. In its legal sense it includes everything done contrary to justice, honesty, modesty or good morals: Black's Law Dictionary; Bouvier's Law Dictionary. The word "moral," which so often precedes the word "turpitude," does not seem to add anything to the meaning of the term, other than that emphasis which often results from a tautological expression. All crimes embraced within the Roman's conception of the *crimen falsi* involve turpitude; but it is not safe to declare that such crimes only involve turpitude. Murder involves vileness and depravity; for it is the result of an abandoned and malignant heart. Voluntary manslaughter involves the intentional destruction of human life. It is true that there is no deliberation, no malice, in the act constituting the offense, but the manslayer intends to kill, and carries out the intention in an unlawful manner. It may be the result of passion or ⁴⁶¹ temper, and the law in its mercy visits a less penalty than that inflicted for willful killing; but it necessarily involves the intention to unlawfully deprive another of life. Whenever one intentionally and wrongfully takes human life, he does an act which is base vile, depraved and contrary to good morals. That the offense of voluntary manslaughter involves moral turpitude cannot admit of serious question: See, in this connection, 5 Words and Phrases, 4580.

2. The right of the libelant to a divorce results from the conviction and sentence. There are three essential ingredients in the ground for divorce: the commission of the offense involving moral turpitude, the conviction for the same, and a sentence for a term of two years or longer in the penitentiary. When this state of affairs is shown to exist, the law declares the libelant is entitled to a divorce. Can this right given by statute be destroyed by an executive pardon? The pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction. He is no longer infamous; he may vote, hold office, and perform other public functions. Rights which have accrued to individuals as a result of the conviction are not affected by the pardon. Mr. Bishop, in his work on Marriage, Divorce

and Separation, sections 444, 1807, says that where conviction for a crime is declared to be a ground for divorce it is a defense to a divorce suit to show that the convict has been pardoned. He cites no authority for this statement. He does refer to the case of *Young v. Young*, 61 Tex. 191, where it was held that the commutation of the sentence of one convicted of a felony was not equivalent to a pardon. The statute of Texas provided that if a party to a marriage was convicted of a felony and imprisoned in a state prison, this should be a ground for divorce, provided that no suit could be maintained for the conviction of either party until twelve months after final judgment of conviction, nor then if the governor should have pardoned the convict. In that case the governor had commuted the sentence of the convict within twelve months after final judgment; and this was held not to amount to a pardon within the meaning of the statute. Mr. Nelson in his work on Divorce and Separation says that it would seem that if before the trial of the suit for divorce the convict is pardoned, the divorce should not be granted. He cites no authority for the proposition. Reference is made to ⁴⁶² the case of *Young v. Young*, 61 Tex. 191, and also to the case of *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928, 63 N. W. 83, 31 L. R. A. 575. In that case it was held that the reversal of a sentence of one convicted of a felony did not have the effect of restoring the conjugal rights taken away by virtue of a statute which declared that a sentence of imprisonment for life should dissolve the marriage of the person sentenced. Mr. Keezer, in his recent work on Marriage and Divorce, says that no pardon granted after the decree of divorce will restore such party to his or her conjugal rights. To sustain this proposition he cites the case of *Young v. Young*, 61 Tex. 191, and *Handy v. Handy*, 124 Mass. 394. In the case last cited the facts were peculiar, and it is impossible to tell from the meager statement in the report exactly what was the extent of the ruling. We have been able to find no decision which is a direct ruling on the question now before us. We think the better view is that the pardon of the convict does not destroy the right to a divorce, declared by statute to arise upon conviction and sentence.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

The Dissolution of Marriage consequent upon the sentence of either spouse for life is absolute, and a reversal of the sentence does not restore the parties to their marital relations, where the court pronouncing the sentence had jurisdiction of the accused and of the offense: *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 928.

MORRIS v. DUNCAN.

[126 Ga. 467, 54 S. E. 1045.]

PUNITIVE DAMAGES Against the Estate of a Decedent cannot be Awarded, because, on account of his death, the object in awarding such damages must fail. (p. 106.)

DAMAGES for Wounded Feelings are not Punitive but Compensatory, and the estate of a decedent may be liable for such damages. (p. 106.)

STATUTES, Construction of Must be Prospective.—A statute authorizing a court to open defaults does not apply to judgments by default already existing. (p. 107.)

Action for damages for the malicious use and abuse of civil process in levying on the household effects of the defendant on a debt which she did not owe. During the pendency of the action, the defendant died, and his executors were substituted as defendant. The court instructed the jury, among other things, as follows: "Now, what sum you shall allow, if you allow any, is to be determined by you, and, as already stated to you, you will take into consideration the character of the wrong, and then, desiring to be fair and just to both sides, you would assess in favor of the plaintiff such sum as would receive the approval of your enlightened consciences, desiring, as I have said, to be fair and just to both sides, and not oppressive to the defendant, because as to this class of damage the law declares there is no standard by which to measure it except the enlightened consciences of impartial jurors." Verdict for the plaintiff for twelve hundred and thirty dollars, and the defendant appealed.

W. H. Terrell, for the plaintiffs in error.

B. J. Conyers, contra.

470 **ATKINSON, J.** 1. Considering the objections urged against the portions of the charge last above quoted, it is

evident that they were well taken. Damages which are given merely as a punishment to deter the wrongdoer from a repetition of the offense clearly have no reference to compensation for the wrong inflicted. The award of such damages against the estate of a wrongdoer no longer in life must fail of its object, and could not therefore be allowed: See 12 Am. & Eng. Ency. of Law, 42, and 13 Cyc. 120, and cit. Damages, however, for wounded feelings are not punitive, but compensatory (see *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217); and if the jury in their discretion deemed it proper to award them, the defendants might be liable for such damages, just as well as for compensatory damages of any other class. A given act of trespass, as, for example, by injury to personal property, as alleged in this case, may be committed in such a way as to authorize a recovery of damages as compensation for injury to the property, or for attorneys' fees, or for the wounded feelings of the person injured on account of aggravating circumstances attending the commission of the injury. And in addition to these, if the aggravation warrant, there may be a further sum recovered, not as compensation to the injured party, but as a penalty against the trespasser to prevent a repetition of such conduct upon his part. As already stated, the defendant being dead, no punishment can be inflicted by the allowance of a recovery purely for that purpose, and a right of recovery of such damages would not survive against his representative. But where there has been injury to the property or feelings of the plaintiff by the trespass for which she is entitled to compensation, her right of recovery as to these compensatory damages survives, and may be enforced against the estate of the deceased. This is true although the right to damages for wounded feelings may arise from the same aggravating circumstances which would have authorized a recovery of an additional sum, not in any way compensatory to the plaintiff, but purely as a punishment of the trespasser, had he lived. It follows that the court should not have charged upon the ⁴⁷¹ subject of additional damages as complained of. The charge should have been so restricted as to prevent confusion in the minds of the jury, in order that they might avoid confounding the right to compensatory damages with a liability upon the part of the defend-

ant for punitive damages. The charge as dealt with being sufficient to require the grant of a new trial, a further discussion of the errors complained of is not necessary.

2. Prior to the act of 1902, page 117, the judge of the city court of Atlanta had no power to open a default: *Dodson Printers' Supply Co. v. Harris*, 114 Ga. 966(2), 41 S. E. 54; *Beacham v. Kea*, 118 Ga. 406, 45 S. E. 398; *Cheatham v. Brown-Catlett Furniture Co.*, 118 Ga. 420, 45 S. E. 399. A case in that court was required to be answered on or before the first day of the first term of court; otherwise it would be in default. The act above referred to provided that the judge "may open defaults upon the same terms and conditions as may judges of the superior courts of this state." But that act was prospective in its operation, and did not contemplate default judgments then in existence. It follows that the default in this case, which existed on the first Monday in July, 1898, did not fall within the operation of the act, and could not be opened by order of the court. Had the court been vested with power, there was in point of fact no order of court taken directing that the default be opened. There was merely a petition filed July 5, 1898, asking permission to open the default and file a plea. No order whatever was passed upon the petition, but a plea was filed without any apparent sanction of the court. On July 21, 1904, the plaintiff moved the court to strike the plea from the files of the court. The plea being in court without authority of law or the sanction of the court, there was no other course except to strike the plea.

Judgment reversed.

All the justices concur, except Fish, C. J., absent.

The Death of a Wrongdoer destroys any right of action to recover exemplary damages for the wrong: See the note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 875.

ALBRIGHT-PRYOR COMPANY v. PACIFIC SELLING COMPANY.

[126 Ga. 498, 55 S. E. 251.]

JURISDICTION, Necessity of Return Supporting.—To authorize judgment against a person who has not appeared or answered or otherwise submitted himself to the jurisdiction of the court, there must be not only service upon such defendant, but a legal return of service. (p. 110.)

JURISDICTION.—In Attachment Cases the Levy Takes the Place of the Service. Where there has been no step taken to acquire jurisdiction of the defendant's person, and he has not submitted himself to the jurisdiction of the court, it is without jurisdiction to render judgment, unless there has been a legal seizure of property owned by him within the jurisdiction of the court, and then only after a legal return of such seizure has been duly entered. (p. 110.)

ATTACHMENT, Levy of Must Show on Whose Property It is. It is essential to the validity of an attachment against a nonresident that the entry of the levy show that the property was levied on as the property of the defendant in the attachment, and when there are two or more defendants, the entry must show to which of them such property belonged. (p. 110.)

A JUDGMENT or Attachment Against a Nonresident When the Return of the Levy Does not Show to Which of the Defendants the Property Belongs is without jurisdiction and void. (p. 110.)

A JUDGMENT on a Garnishment Against a Nonresident is Unauthorized and Void if, at the time it was rendered, the garnishee had not answered, and there was nothing before the court from which it could be determined whether any property of either of the defendants had been seized. (p. 111.)

ATTACHMENT—Amendment of Entry of Levy.—If an attachment is levied on personal property, the entry of such levy is amendable, but the amendment does not relate back so as to render a judgment previously entered valid. (p. 111.)

ATTACHMENT—Jurisdiction to Enter Judgment in Must be Acquired Before the Return Term.—The subsequent issuing and return of summons in garnishment cannot give validity to a judgment if there had been no seizure of the property of the defendant before the return term, and jurisdiction had not been otherwise acquired. (p. 112.)

PRACTICE.—An Amendment May be Made to a Motion to Set Aside a Judgment in which other grounds are added to the motion. (p. 113.)

Moore & Pomeroy, for the plaintiff.

J. W. Moore and George Gordon, for the defendant.

⁴⁹⁹ COBB, P. J. On October 28, 1904, Albright-Pryor Company sued out an attachment against the Pacific Selling Company, a nonresident corporation, and Thos. Roberts &

Co., a nonresident partnership, claiming an indebtedness of one thousand dollars. This attachment was levied by serving summons of garnishment upon three railroad companies, and "also by levying on the following property as the property of defendant: fifty cases of canned salmon, contained in Southern car No. 24,425," etc. The attachment was returnable to the January term of the city court of Atlanta, which begins on the first Monday in January. At the time none of the railroad companies answered the summons of garnishment. On January 25, 1905, the attachment was further levied by serving summons of garnishment upon the Atlanta National Bank. On February 24, 1905, the plaintiff filed its declaration in attachment. At the March term, which was the trial term, the Atlanta National Bank answered, admitting possession of fifteen hundred and thirty-eight dollars and sixty cents belonging to the Pacific Selling Company; and as the latter company failed to answer the suit, a judgment was rendered against it on April 14, 1905. On May 29, 1905, the Pacific Selling Company filed a motion to vacate the judgment against it, upon the ground that no jurisdiction had been obtained against the movant by levy ⁵⁰⁰ upon any of its property. It was alleged in the motion that the salmon levied upon was not the property of movant, but was the property of Roberts & Co.; that no property of movant was seized by the garnishment upon the railroad companies; and that on the first Monday in January, 1905, the date on which the attachment was returnable, no property of movant had been seized. It was also alleged that while the attachment was sued out for one thousand dollars, the petition showed an indebtedness of only nine hundred dollars, and the judgment should be vacated upon this ground. It was further alleged, by amendment, that the entry of the constable, wherein it appeared that he levied upon the canned salmon "as the property of the defendant," was void for uncertainty, there being two defendants. To the motion and amendment the plaintiff filed general and special demurrers, which were overruled. An answer was also filed, denying the material allegations of the motion. The levying officer, who had been made a party, offered to amend his entry so that it would appear that the canned salmon had been levied on as the property of the Pacific Selling Company.

This amendment was disallowed. After a hearing, the judgment was vacated as prayed. Albright-Pryor Company excepted to each of the rulings stated.

1. To authorize a judgment against a person who has not appeared and answered or otherwise submitted himself to the jurisdiction of the court, there must be not only service upon such person, but also a legal return of such service. Until service has been made and a legal return entered, the court is without jurisdiction to enter judgment against a defendant who has not appeared: *Wood v. Callaway*, 119 Ga. 801, 47 S. E. 178, and cases cited.

2. In attachment cases the levy takes the place of service. When no steps have been taken in an attachment case to acquire jurisdiction of the defendant's person, and he has not appeared and answered or otherwise submitted himself to the jurisdiction of the court, the court is without jurisdiction to render a judgment until there has been a lawful seizure of property owned by him within the jurisdiction of the court, and then only after a lawful return of such seizure has been duly entered: *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455.

⁵⁰¹ 3. It is essential to the validity of the levy of an attachment issued against a nonresident that the entry of levy should show that the property was levied on as the property of defendant in attachment; and this is so whether the property be realty or personalty: *Drake on Attachments*, 7th ed., sec. 449. In the absence of such a return the court has no jurisdiction to render a judgment in the case: *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455. When an execution against several defendants is levied, it is essential to the validity of the levy that the entry should disclose to which of the defendants the property seized belonged. A mere general levy upon the property without describing it as the property of the defendant is invalid, and a sale thereunder will not divest the title of the real owner of the land: *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 176. It necessarily follows from what was laid down in the decision cited, that when an attachment against two defendants is levied, and the entry of levy simply shows that certain property was seized as the "property of the defendant," not disclosing which defendant was referred to, the levy fails to disclose a valid seizure of the property of either defendant,

and is insufficient as the basis of a judgment on the attachment. There being, at the time that the judgment on the attachment in the present case was rendered, no entry of levy other than the one above described, the judgment was void, it not appearing from the entry of levy that any property of the defendant against whom the judgment on the attachment was rendered had been seized, and the court was therefore without jurisdiction.

4. It is said that the judgment is authorized, because there was an entry of service of garnishment upon three railroad companies, and the garnishees had not answered, and that the judgment was valid, and would be operative upon any property that would thereafter be disclosed by the answer of such garnishees. The garnishees not having answered, it was impossible at the time the judgment was rendered to determine whether any property of either of the defendants had been seized, and until this fact appears the court is without jurisdiction to render the judgment: *Henry v. Lennox-Haldeman Co.*, 116 Ga. 9, 42 S. E. 383.

5. The levy having been upon personal property and the entry, therefore, being mere evidence of seizure and not the seizure itself, it is amendable. The jurisdiction of the court depending upon both the seizure and the entry, the amendment would not relate ⁵⁰² back so as to render the judgment valid. The case of *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25, was not an attachment case, and in addition to this the motion to set aside the judgment showed affirmatively that the garnishee had been properly served.

6. But it is said that the summons of garnishment issued against the bank resulted in an answer disclosing assets in the hands of the bank belonging to the defendant against whom the judgment in attachment was rendered, and therefore the court had jurisdiction to render the judgment. The code declares that when affidavit and bond to obtain garnishment have been given, summons of garnishment may issue from time to time before trial, without giving any additional bond: Civ. Code, sec. 4709. In *Alston v. Dunning*, 35 Ga. 229, it was held that summons of garnishment founded on an attachment may issue after the return term of the attachment without additional affidavit and bond. In that case the attachment was levied upon certain personal property of the defendant, and was also executed by ser-

vice of summons of garnishment, all of this being done before the return term. The garnishments were subsequently dismissed, and after the return term new summons issued directed to the same garnishees. The jurisdiction of the court depends upon the proceedings had prior to the return term: Waples on Attachment, 2d ed., sec. 295; Drake on Attachments, 7th ed., sec. 451 (b); 1 Wade on Attachment, sec. 128; 2 Wade on Attachment, sec. 336; Nance v. Barber, 7 Tex. Civ. App. 111, 26 S. W. 151. If there has been no seizure of the property of the defendant before the return term, the court is without jurisdiction in the matter, and all subsequent proceedings are invalid. Hence when the court had failed to acquire jurisdiction at the return term, summons of garnishment issued after that time would be invalid. It would be otherwise, however, if the court had acquired jurisdiction. In the case above cited (*Alston v. Dunning*, 35 Ga. 229), the validity of the attachment was not brought into question, and therefore the decision cannot be treated as authority for the proposition that a seizure of personal property before the return term, which is claimed by a third person and the claim subsequently sustained, would give the court jurisdiction to render a judgment on the attachment. If there has been a levy upon tangible personal property under the attachment and before the return term, the court would have jurisdiction to render a judgment on the attachment, provided the legal return of such levy was ⁵⁰³ made before the return term, or thereafter entered nunc pro tunc before the judgment. If the attachment has been executed by serving summons of garnishment, it is of course not essential to jurisdiction that the fact that effects of the defendant have been seized under the garnishment should appear before the return term. But the jurisdiction of the court is in abeyance until the fact that there are effects in the hands of the garnishee appears by answer, or by judgment on a traverse to the answer. If the court acquires jurisdiction before the return term as a result of a seizure under levy of tangible personal property, judgment may be so entered that it will operate upon funds thereafter brought in under answers of garnishees: *Steers v. Morgan*, 66 Ga. 552. The seizure of the personalty would give the court jurisdiction to render an absolute judgment as to the property so seized, and a pro-

visional judgment as to that which might thereafter be brought in under proceedings against the garnishees. However, if the attachment is executed by service of summons of garnishment only, then no judgment can be rendered until it is made to appear to the court that the effects of the defendant have been seized under garnishment proceedings. In the present case the court did not acquire jurisdiction as to the property levied on, for the reason that there had been no legal entry of the levy prior to the judgment. At the time the judgment was rendered it did not appear from the answer of the garnishees who had been summoned to answer at the return term that any of the effects of the defendant were in their hands. The validity of the garnishment sued out after the return term depending upon the jurisdiction of the court having been acquired before the return term, the court was without authority to enter judgment on the answer of such garnishee, until it appeared from the answer of the other garnishees whether such jurisdiction had been acquired.

7. An amendment was offered to the motion to set aside the judgment, in which other grounds were added to the motion. Objection was made to this amendment, on the ground that it added a new cause of action. We do not think the law prohibiting the addition of new causes of action by amendment has application to a proceeding of this character, and the court did not err in allowing the amendment.

Judgment affirmed.

All the justices concur, except Fish, C. J., absent.

Judgments Depending for Their Validity on an attachment of property are considered in the note to *Miller v. White*, 76 Am. St. Rep. 800.

Am. St. Rep., Vol. 115—8

WALPERT v. BOHAN.

[126 Ga. 532, 55 S. E. 181.]

INNKEEPER, Liability of When He Also Maintains a Bathhouse.—If one keeps an inn, and, separately therefrom, a bathhouse, where persons bathing in the sea change their garments and leave their clothes, he is not liable as an innkeeper for property stolen from the bathhouse. (p. 116.)

BATHHOUSES and Bathing Establishments, Liability of Keepers of.—The proprietor of a bathing establishment who receives from his patrons a sum demanded for the privilege of the bath and assumes the custody of their wearing apparel while they are bathing, is a voluntary custodian for profit, and bound to exercise due care to guard against the loss of theft by others having access to his establishment by his permission. He is a bailee for hire and bound to exercise ordinary care, and liable for his failure to do so. (p. 117.)

Alexander & Edwards, for the plaintiff.

O'Connor, O'Byrne & Hartridge, for the defendant.

532 LUMPKIN, J. Mrs. Walpert brought suit against William Bohan, alleging in substance as follows: Bohan was a resident of Chatham county, and was during the month of May, 1905, the proprietor and owner of a certain sea-shore inn called "Bohan's Pavillion," or "Bohan's Hotel," located on the island of Great Tybee, and was "at that time engaged at said place in the business of an innkeeper. In connection with said inn, and as a part of said inn, and as a part of his said business at said place as an innkeeper, said Bohan maintained a certain bathhouse, where he is and was at that time accustomed to furnish for rent or hire to such of his guests and the general public who desired to enjoy the pleasure and benefits of sea-bathing, bath-rooms, bathing suits, and other bathing accessories." On May 11, 1905, "petitioner, along with several friends, desiring to enjoy the entertainment of said inn, and the pleasure and advantages of sea-bathing, paid to the said William M. Bohan the charges or hire therefor, and became and were the guests of said inn and of the said William M. Bohan as such innkeeper, and as such were guests and were received as such therein and thereat; that in said bathhouse, a part of said inn, as aforesaid, is a certain public room or office in charge of a keeper or attendant as the servant, agent, and direct representative of the said

William Bohan, . . . who furnishes to guests, for hire, such bathing-rooms, towels, etc., as is required for sea-bathing, and assigns then to bathrooms ⁵³³ in said inn or bathhouse; and receives from said guests for safekeeping, while they are bathing in the sea and not occupying their said rooms, such articles, jewelry, money and other valuables as they may have, so that the same shall not be lost or stolen from their bathrooms while they are absent therefrom, and that posted in a conspicuous place and in full view of the public is a large printed or written sign or notice requiring the guests of said inn and bathhouse to deposit with the keeper or custodian in charge of said office all moneys, jewelry and other articles of value for safekeeping, and warning them that upon failure to comply with this requirement the said innkeeper would be relieved of all liability for any losses sustained through theft, or otherwise." Petitioner, after having inquired of defendant's agent whether a deposit of her valuables would be safe, and being assured that they would be, and after having shown the same to such attendant and apprised him of their value, deposited with such agent of defendant a hand-bag containing a small sum of money and a diamond brooch and ring of the value of seven hundred dollars, receiving a check therefor. This deposit of valuables was made along with those of one of petitioner's party of friends accompanying her, and a single check issued for the property of both. After returning from her bath, Robinson, "acting for himself and petitioner," presented the check and received the hand-bag, when upon examination it was found that "petitioner's hand-bag or purse had been entered" and the diamond brooch and ring taken therefrom. It was opened in full view of the attendant in charge, and the loss immediately reported to this agent of defendant. Petitioner demanded of defendant compensation for her loss, and the defendant refused to pay the same. Petitioner's loss was not occasioned by any fault or neglect on her part, but occurred through the neglect "of the said William M. Bohan, innkeeper, his servants, agents, employés, and representatives, as aforesaid." The petition prayed for a judgment for seven hundred dollars and costs, and for process. The defendant filed a general demurrer, which was sustained, and the plaintiff excepted.

If one keeps an inn, and also, separate from the inn, keeps a bathhouse where persons bathing in the sea change their garments⁵³⁴ and leave their clothes, he is not chargeable as an innkeeper for property stolen from the bathhouse: *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318. In the opinion in this case it is said: "We are not now speaking of bathrooms attached to or kept within hotels, but of separate buildings, erected upon the seashore, and used, not as bathrooms, but as places in which those who bathe in the sea change their garments and leave their clothes and other valuables while so bathing." In Schouler's *Bailments and Carriers*, third edition, section 280, it is said: "One who keeps a public house may, not inconsistently, carry on a restaurant, cater to a select company, serve liquors at a bar, keep a shaving-saloon, or permit outside parties to get up a ball on his premises; and, as to strangers who avail themselves of such extraneous service, he is no innkeeper at all." It is true that the declaration alleges in general terms that in connection with the inn, and as a part of it, and as a part of his business at that place, the defendant maintained a certain bathhouse where he was accustomed, for rent or hire, to furnish to such of his guests and the general public as desired to enjoy the pleasure and benefits of sea-bathing, bathrooms, bathing suits, and other bathing accessories. It does not appear, however, that the bathhouse was physically connected with the inn, or was for the use of guests as such, or that becoming a guest at the inn entitled one to use the bathhouse, or that conducting it was an actual part of innkeeping; but apparently it was a separate and distinct building on the seashore, where the general public, whether guests of the inn or not, could for hire obtain dressing-rooms and other accessories of sea-bathing. We do not think this was sufficient to show that the relation of innkeeper and guest existed between the proprietor of the bathhouse and those who went there for the purpose of bathing in the sea. Although the proprietor of the bathhouse may have also been an innkeeper, operating the bathhouse, it did not thereby become a part of the innkeeping. When the facts set forth show that the defendant, in reference to the transaction under consideration, is not an innkeeper, merely to call him by that name in the pleading does not determine his liability as that of an innkeeper. Ancient

common-law definitions of an inn are not altogether applicable to modern conditions and methods of travel and innkeeping. Thus Lord Bacon defines an innkeeper to be "a person who makes it his business to entertain travelers and passengers, and to provide lodgings ⁵³⁵ and necessaries for them and their horses and attendants": Bacon's Abridgment, title "Inn and Innkeepers," B. Few now travel with horses and attendants; nor is the entertainment of transient customers confined to actual travelers. A very good definition of an innkeeper at present is, "one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense": Schouler on Bailments and Carriers, secs. 279, 303. If the proprietor of a hotel should also furnish, for hire by his guests and others, boats for rowing and sailing on a river or lake, or should maintain a public racecourse or golf-links or a baseball park, where all could enter by paying an admission fee, these things would evidently not be a necessary part of keeping an inn, although they might furnish attractive sports which would give pleasure to guests and others: See *Bonner v. Welborn*, 7 Ga. 296; 16 Am. & Eng. Ency. of Law, 2d ed., 509.

2, 3. While this is true, we think the presiding judge erred in dismissing the petition on general demurrer. In *Bird v. Everard*, 4 Misc. Rep. (N. Y.) 104, it was held that the proprietor of a bathing establishment who receives from his patrons the sum demanded for the privilege of a bath, and assumes the custody of their wearing apparel while the latter are enjoying the privileges thereof, becomes a voluntary custodian of the patrons' apparel for profit, and is bound to exercise due care to guard against loss or theft by others having access to his establishment with his permission; and for any loss or theft which could have been prevented by the exercise of such care, said proprietor is answerable in damages: See, also, *Bunnell v. Stern*, 122 N. Y. 539, 19 Am. St. Rep. 519, 25 N. E. 910, 10 L. R. A. 481; *Tombler v. Koeling*, 60 Ark. 62, 46 Am. St. Rep. 146, 28 S. W. 795, 27 L. R. A. 502; *Dilberto v. Harris*, 95 Ga. 571, 23 S. E. 112; 7 Am. & Eng. Ency. of Law, 2d ed., 321, 322, and notes. The proprietor of such an establishment, who receives the apparel or valuables of a bather for safekeeping while the customer is bathing, and receives a consideration

for this and the use of the bathroom or dressing-room and accessories to the bath, being a bailee for hire, is bound to use ordinary care, and is liable for a failure to do so. The declaration sufficiently alleged negligence on the part of the defendant or his agent, and was not subject to a general demurrer.

Judgment reversed.

All the justices concur, except Fish, C. J., absent.

The Liability of Innkeepers for injury to or loss of the property of their guests is considered in the note to *Johnson v. Chadburn Finance*, 99 Am. St. Rep. 577.

The Liability of the Keeper of a Bathhouse for the property of his customer is considered in *Tombler v. Koelling*, 60 Ark. 62, 46 Am. St. Rep. 146.

BRIDGER v. EXCHANGE BANK.

[126 Ga. 821, 56 S. E. 97.]

PRACTICE.—Whether a Court Will Reopen a Cause for the introduction of further evidence after both parties have announced the evidence closed, and while the motion for the direction of the verdict is being argued, rests in the discretion of the court. (p. 120.)

PRACTICE.—Partial Reopening of a Cause—The Court may Permit the Reopening of a Cause to allow evidence to be offered on a particular point without being compelled to reopen it for the general introduction of evidence. (p. 121.)

NOTICE.—Possession of Land is Notice of whatever right or title the occupant has. (p. 121.)

LIS PENDENS Affects not Only a Purchaser from One of the Parties to the suit, but also those who hold under him. (p. 123.)

LIS PENDENS Applies to Purchasers from the Plaintiff as well as to purchasers from the defendant. (p. 123.)

LIS PENDENS Applies to a Judgment Creditor whose rights as an encumbrancer are acquired during the existence of the *lis pendens*; and also to the purchaser of the property at a judicial sale had in execution of the judgment in favor of a person whose interests in the property to be sold are affected by the *lis pendens*. (p. 123.)

LIS PENDENS Begins in Georgia from the filing and docketing of the petition, if followed by the issuance and service of process and due prosecution. (p. 124.)

LIS PENDENS.—Cross-complaint.—Relative to an affirmative cross-action or cross-complaint, the defendant occupies the position of a plaintiff, and a *lis pendens* as to the cross-complaint operates against a purchaser from the plaintiff only from the time it is filed. (p. 126.)

LIS PENDENS—Laches.—Either the plaintiff or the defendant may lose the benefit of the pendency of lis pendens by failure on his part to prosecute with due diligence. (p. 128.)

NOTICE.—The Continued Possession of the Grantor After the Execution of a Conveyance gives the world notice of his rights, as where his conveyance was in effect given as security for indebtedness and he took a bond for a reconveyance on its payment. (p. 130.)

EXECUTION SALE of Property Conveyed to Secure Indebtedness.—If one makes a promissory note and executes a conveyance to secure its payment, and an execution against his grantee is levied on the property, the grantor remaining in possession, the purchaser under such execution takes only the rights of such grantee. (p. 130.)

EXECUTION, Burden of Proof in an Attack Upon.—One who alleges that a levy is void for excessiveness carries the burden of sustaining his contention. (p. 130.)

EXECUTION.—A Levy is not Necessarily Excessive because the value of the land is considerably more than the amount of the execution. (p. 130.)

EXECUTION—Excessiveness of Levy, When a Question for the Jury.—If the property levied upon and sold under execution was worth considerably more than the amount due, and it was reasonably capable of subdivision, and fronted fifty-five feet on one street and ran back two hundred feet to an alley, giving an outlet to another street, and there were houses fronting on both the street and the alley, separately numbered and separately rented, it is a question for the jury whether the levy was excessive and whether the property should have been divided for the purpose of sale. (pp. 130, 131.)

Petition filed August 15, 1893, and served on the eighteenth day of the same month by H. L. Woodward against J. C. Bridger, praying for a judgment declaring a special lien against certain real property, on the ground that the same had been conveyed by Bridger, as trustee for his wife and children, for the purpose of securing the payment of certain indebtedness. The defendant pleaded that the indebtedness held by the plaintiff was accommodation paper, wholly without consideration, and was the individual obligation of Bridger, all of which was known to the plaintiff before he received it. The defendant alleged that the conveyance to plaintiff was a cloud on the title of the defendant and his cestui que trust.

On October 27, 1905, and after the filing of the defendant's answer, the Exchange Bank of Atlanta was permitted to intervene. By its complaint in intervention it alleged that on September 27, 1892, Bridger, as trustee for his wife and children, conveyed to plaintiff the property described in his petition under a conveyance duly recorded, and the plaintiff by a conveyance recorded May 30, 1895, conveyed

his interest to Emmet B. Woodward; that the bank levied upon and sold under execution the interest of Emmet B. Woodward in the property, and received a sheriff's deed therefor, having no notice that he was not the absolute owner of the property, although the present suit had been previously commenced; that no pleading had been filed in the present suit after its commencement until a few days before the filing of the petition for intervention, when the defendant filed his amended answer and cross-bill. The bank prayed that the cross-bill be stricken out and relief thereunder be denied, and that the conveyance made by the defendant to H. L. Woodward be declared good and valid. Bridger, as trustee, answered the complaint of intervention, alleging that neither Emmet B. nor H. L. Woodward had ever had possession of the land, and that Emmet B. Woodward when he took his conveyance had full knowledge of the nature of the transaction between the defendants and H. L. Woodward. The court directed a verdict against the defendant and in favor of the bank upon the issues as to title, and the defendant appealed.

W. H. Terrell, for the plaintiff in error.

L. Z. Rosser, J. H. Porter and Dorsey, Brewster & Howell, contra.

824 LUMPKIN, J. 1, 2. After both parties had announced the evidence closed, and while a motion for the direction of a verdict was being argued, it rested in the discretion of the court to determine whether he would reopen the case for the introduction of further evidence: *Walker v. Walker*, 14 Ga. 242; *Blackman v. State*, 80 Ga. 785, 791, 7 S. E. 626; *Orr v. Garabold*, 85 Ga. 373, 11 S. E. 778; *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *Green v. State*, 119 Ga. 120, 45 S. E. 990; *Maddox v. Cole*, 81 Ga. 325, 6 S. E. 601; *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Georgia R. & B. Co. v. Churchill*, 113 Ga. 12, 38 S. E. 336; *Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723. This was not an application seeking to save a nonsuit by supplying an omitted link in the chain of evidence and thus causing the case to proceed to a termination of the litigation, but a desire to add evidence to avoid the direction of a verdict, which addition would probably require a general reopening of the trial on the evidence. **825** No good reason

was shown why the additional evidence was not offered before. On application the court did reopen the case to allow evidence to be introduced on a particular point; but, by having done so, he was not compelled to throw the case open broadly for the general introduction of evidence. Even as to a motion to reopen the case after a motion for nonsuit has been made and argued, and especially after the judge has announced his decision, the rule does not seem to be entirely arbitrary and regardless of the circumstances: *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Brooks v. Lowe*, 122 Ga. 358, 50 S. E. 146 (citing *McColgan v. McKay*, 25 Ga. 631, as to the general practice). But that point is not directly before us.

3, 4. The defendant (plaintiff in the cross-petition) testified that as trustee he was in continuous possession of the property, through his tenants, except that after the sheriff's sale the bank obtained and held possession for a time, when he again took possession. If this be accepted as true, which it must be on a motion to direct a verdict against him, so far as the matter of notice by possession is involved, the case falls within the general rule declared in the Civil Code, section 3931, that "possession of land is notice of whatever right or title the occupant has." This has been held to apply to possession under a bond for title (*Finch v. Beal*, 68 Ga. 594; *Jordan v. Rhodes*, 24 Ga. 480), and generally to any right or title of the occupant: *Neal v. Jones*, 100 Ga. 765, 28 S. E. 427; *Baldwin v. Sherwood*, 117 Ga. 827, 45 S. E. 216. This case is not controlled by that of *Johnson v. Equitable Securities Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933. It was there held that a bona fide purchaser at sheriff's sale, who has paid the purchase money without notice of a secret equity, will be protected. On page 608 it was said that "the purchaser at such sale would, in our opinion, occupy the same position as the purchaser at a private sale, so far as any secret equity held by some one in the property was concerned, if such purchaser bought the property and paid his money without notice of such secret equity." It was not decided that if he bought with notice he would obtain a good title, nor was the question of notice by possession discussed. In *Malette v. Wright*, 120 Ga. 735, 48 S. E. 229, it was held that where one sold property and made a fee simple deed thereto, but

by mistake included in the deed certain land not intended to be included, and such deed was duly recorded, his remaining in possession would not give notice to the world of the mistake, so as to affect bona fide purchasers or those occupying a like ⁸²⁶ situation. This was the only point decided. The decision never intended to abrogate the general rule, but merely held that the facts of that case did not fall within it. What was said in the opinion must be construed in the light of the question involved.

Although the bond for title was made to Bridger as an individual, the trust estate had an interest, which could not be thus destroyed. If he had a right to make the conveyance and take the bond for title, the latter in his hands would be affected with an equity in favor of the trust. That possession puts a prospective purchaser on inquiry: See *Walker v. Neil*, 117 Ga. 733, 45 S. E. 387; *Austin v. Southern Home Bldg. etc. Assn.*, 122 Ga. 439, 50 S. E. 382.

5-10. Two different theories have been advanced as the basis of the doctrine of *lis pendens*. Numerous courts and text-writers state that it is referable to the doctrine of constructive notice, and say that a pending suit concerning property operates as notice to the world, and that a purchaser of the property under one of the parties is bound by the result of the litigation, because he is charged with such notice. The other view is thus stated in *Bellamy v. Sabine*, 1 De Gex & J. 566: "The doctrine as to the effect of *lis pendens* on the title of an alienee is not founded on any principles of courts of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not." On page 584 Lord Justice Turner makes this clear and concise statement: "It is, as I think, a doctrine common to the courts both of law and of equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by

the same course of proceeding." The latter theory appears to have been adopted by most of the recent decisions: 2 Pomeroy's Equity Jurisprudence, sec. 632, and notes. Whichever opinion may be accepted, it will not affect the well-settled rules concerning *lis pendens*, although if the second be upheld it may "prevent the extension ⁸²⁷ of the doctrine, and restrict its further application to particular persons and conditions": 2 Pomeroy's Equity Jurisprudence, sec. 632, and notes.

An application of the doctrine to the present case involves a decision of several points. Not only is a purchaser from one of the parties to the suit affected, but also those who hold under him: *Beardsley v. Hilson*, 94 Ga. 50, 20 S. E. 272. It applies not merely to purchasers from the defendant, but also to purchasers from the plaintiff: *Bennett on Lis Pendens*, 287, sec. 239. "The rule has been applied with steadiness to all cases of transfer during the progress of a cause, notwithstanding the hardship of individual cases, from considerations of public policy and convenience. Suits would be interminable, if the rights of parties could be disturbed by *mesne* conveyances; and a necessity imposed for the introduction of other parties upon the record": *Secombe v. Steele*, 61 U. S. 94, 15 L. ed. 833; *Fash v. Ravesies*, 32 Ala. 451; *Berry v. Whitaker*, 58 Me. 422; *Cole v. Winnipisseogee Lake etc. Co.*, 54 N. H. 242; *Olson v. Leibpke*, 110 Iowa, 594, 80 Am. St. Rep. 327, 81 N. W. 801; *Welton v. Cook*, 61 Cal. 481; *Borrowscale v. Tuttle*, 5 Allen, 377; *Garth v. Ward*, 2 Atk. 174; *Bellamy v. Sabine*, 1 De Gex & J. 566; 2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 633; *Story's Equity Pleading*, 10th ed., sec. 156. The rule applies to a judgment creditor whose rights as an encumbrancer are acquired during the existence of the *lis pendens*; and also to a purchaser of the property at a judicial sale had in execution of a judgment in favor of a person whose interests in the property thus sold are affected by the *lis pendens*: 21 Am. & Eng. Ency. of Law, 645, 646; *Carmichael v. Foster*, 69 Ga. 372; *Bennett on Lis Pendens*, p. 242, sec. 181; *Secombe v. Steele*, 61 U. S. (20 How.) 94, 15 L. ed. 833; *Allen v. Halliday*, 28 Fed. 261; *Cotton v. Dacey*, 61 Fed. 481; *Freeman on Judgments*, sec. 205; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595; *Watson v.*

Wilson, 2 Dana, 406, 26 Am. Dec. 459; Ettenborough v. Bishop, 26 N. J. Eq. 262; McCauley v. Rogers, 104 Ill. 578.

When does the *lis pendens* begin? In England and in some states it has been held to be upon service of process or subpoena. In this state a pending suit is notice to the world from the filing and docketing, if followed by the issuance and service of process and due prosecution: Civ. Code, sec. 3936; Weems v. Harold, 75 Ga. 866; Cherry v. North & South R. Co., 65 Ga. 633. What, then, as to a cross-action or answer in the nature of a cross-bill seeking ⁵²⁸ affirmative relief? Does it relate back to the beginning of the suit and affect a purchaser from the plaintiff from that time, or does it operate as a *lis pendens* from the date of its filing? Two different opinions are entertained on this subject. The leading case on one side is Hall Lumber Co. v. Gustin, 54 Mich. 624, 20 N. W. 616, in which that distinguished jurist, Judge Cooley, delivered the decision. The seventh headnote reads as follows: "A suit and cross-suit constitute one cause, and notice of the suit is notice of the cross-suit also. So held in the case of a *lis pendens* filed in an original foreclosure suit, but not in a cross-suit for foreclosure; it was constructive notice to all the defendants." Strictly speaking, the exact matter before the court was this: A statute required (as in many states and now in England) a notice of a *lis pendens* to be filed in order to be effectual. On the bringing of a foreclosure suit the notice was filed. Later a cross-bill was filed, but no notice under the statute was filed as to it. The question was whether it was necessary to file such a notice as to the cross-bill, or whether that filed at the commencement of the suit covered the whole case. It would be perhaps too narrow a view to treat this decision as merely a construction of the Michigan statute; as the reasoning goes to the point of holding that "notice of the suit was notice of all that properly belonged to it," including the cross-bill as a mode of defense. In Bennett on *Lis Pendens*, section 331 (pages 379, 380), in stating this as a rule it is said: "That is to say, a *lis pendens* will exist as between all parties to the suit. It might be held otherwise as to third parties having no knowledge of the cross-claim." The only case referred to in this footnote is the Hall case (54 Mich. 624, 20 N. W. 616), and the criticism was evidently meant

to apply to it: See, also, *Henderson v. Wanamaker*, 79 Fed. 736, 25 C. C. A. 181 (where, however, the answer of the defendant had been filed); *Kinney v. Consolidated Virginia Min. Co.*, 4 Saw. 382, Fed. Cas. No. 7827. The adverse view is thus clearly stated in 2 Pomeroy's *Equity Jurisprudence* (third edition, section 634): "I would remark, in passing, that while the general doctrine of notice by *lis pendens* and the foregoing special rules have ordinarily been applied to real property described by the plaintiff in his bill of complaint, they should, upon principle, apply with equal force to the 'counterclaims' and 'cross-complaints' authorized by the reformed procedure, by which the defendant alleges some equitable interest or right, and demands some affirmative equitable relief. In such ~~and~~ pleadings the defendant becomes the actor, and is to all intents and purposes a plaintiff." This remark is quoted approvingly, though the point is not decided, in *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537.

It appears to us that the proper determination of the mooted question depends largely on what is the extent of the *lis pendens* arising on the original suit. Or, if the doctrine of notice be adopted, of what does the original suit give notice to one dealing with the property. Mr. Pomeroy says (2^d Pomeroy's *Equity Jurisprudence*, 3d ed., sec. 634): "*Lis pendens* is notice of everything averred in the pleadings pertinent to the issue or to the relief sought, and of the contents of exhibits filed and proved. . . . The notice arising from a pending suit does not affect property not embraced within the descriptions of the pleading; nor does its operation extend beyond the prayer for relief." "Averred" in what pleadings—in those filed by the complainant before the time of the purchase (together with certain amendments thereto, as will be seen below) and in the denials or defensive pleadings of the defendant, or in possible affirmative pleadings which may be thereafter filed by the defendant, not merely combating the plaintiff's case, but seeking affirmative relief? Generally, amendments to a bill or petition relate back to the filing of such bill or petition. It has been held that a bill so defective in its averments as not to create a *lis pendens* may be subsequently cured by amendment, but the *lis pendens* will commence at the time of filing the amendment, if the defendant has

been served with process: *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762. See, also, *Miller v. Sherry*, 2 Wall. 237, 17 L. ed. 287 (where the defect was for want of description of the property); *Worthman v. Boyd*, 66 Tex. 401, 1 S. W. 109 (where an original suit to cancel a deed was amended so as affirm the deed and enforce a grantor's lien); *Mansur & Tebbetts I. Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972; *Letcher v. Reese*, 24 Tex. Civ. App. 537, 60 S. W. 256; *Stone v. Connelly*, 58 Ky. 652, 71 Am. Dec. 499. Statements in some of the text-books imply that the continuity of the suit may be broken by a simple amendment, but this seems not to be well founded where the parties are the same, the property to be affected is the same, and the general purpose and object is the same: *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28. It would appear, therefore, that when a suit is filed by a plaintiff, anyone taking from the defendant a conveyance of the property involved takes with notice of, or subject to, the plaintiff's action as it stands, and that mere ordinary ⁸³⁰ or amplifying amendments which do not change the identity of the suit or affect the general purpose or object, or create a new *lis pendens*, will relate back to the date of the filing of the original petition. So, also, if one purchases from the plaintiff, the suit operates as a *lis pendens* in respect to the property described and the relief prayed; and the purchaser may fairly anticipate that the defendant will resist the action, and that he will set up any appropriate defensive matter thereto. But he is not bound to anticipate that the defendant will bring a cross-action against the plaintiff in respect to the property or will file an affirmative cross-complaint against the plaintiff, setting up some equitable right and demanding affirmative equitable relief in regard thereto. Relatively to such affirmative cross-action or cross-complaint the defendant occupies the position of a plaintiff, and the *lis pendens* as to such cross-complaint operates as against a purchaser from the plaintiff only from the time when it is filed. It is evident that if the defendant had to file a separate action against the plaintiff in order to set up the affirmative claim and pray for relief, it would only operate as a *lis pendens* from the time when it was brought; and where, under our uniform procedure act, the plaintiff or defendant may assert all of his rights, legal or equi-

table, in respect to the subject matter of the suit in one proceeding, the same reason would seem to apply to a cross-complaint or affirmative equitable plea praying relief. Under the very liberal system of amending which prevails in this state, the plaintiff may bring an action of complaint for land, which by amendment may be changed into an action seeking equitable relief in regard to the land; and in an equitable action, what would have required a supplemental bill in England can be brought in by amendment in Georgia: Civ. Code, sec. 4969. The defendant may answer the plaintiff's suit by denying title; and subsequently he may amend by alleging affirmative equitable rights on his part in respect to the property and praying relief. Indeed, it is quite common for a suit to begin as an apparently simple action at law, and terminate as a most complex action to settle equities and cross-equities.

If the rule which we have suggested above is not a correct one, and if a person who purchases from a plaintiff in a pending lawsuit were bound to anticipate all possible cross-complaints, which might greatly broaden the scope of the action or alter the nature of ⁸³¹ the relief sought, and if he were affected by the *lis pendens* as to all such possible cross-complaints before they were filed, it would be an exceedingly dangerous matter to purchase property at all from any person who might happen to be either plaintiff or defendant in any sort of action. It is true that the defendant may often show by way of defense substantially the same matters as those on which his affirmative equitable plea would rest; and if one who purchases from the plaintiff after suit has been brought and while the defendant is entitled to plead, but before he has done so, is bound to anticipate that the latter will deny the plaintiff's right of recovery, and to take subject to his doing so, and to the result of the action, the difference in effect between this and his taking subject to a cross-complaint based on like facts may not appear to be great. But the distinction between mere defensive action and an effort to obtain affirmative relief is well recognized, even where similar facts are involved in the two: *English v. Thorn*, 96 Ga. 557, 23 S. E. 843. In *Hart v. Hayden*, 76 Ky. 346, it was held that "When a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, the action of the lat-

ter is not a *lis pendens* until he has filed his cross-petition and has process issued." In *Garver v. Graham*, 6 Kan. App. 344, 51 Pac. 812, where a husband brought an action of divorce, and his wife filed an answer and cross-petition, denying the grounds alleged by him, setting up grounds for divorce in her favor, that she was the owner of certain lands, describing them, and that the husband was the owner of certain other real estate and personal property, describing it, and praying that a divorce be granted her, that the real estate then in the name of her husband (describing it) might be decreed to her, that alimony should be granted, and that all of the property both real and personal should be appropriated to satisfy the decree, it was held that the answer and cross-petition brought the property described within the jurisdiction of the court, and that a person subsequently taking a mortgage from the husband was bound by the judgment and decree rendered: See, also, *Mansur & Tebbetts v. Beer & Co.*, 19 Tex. Civ. App. 311, 45 S. W. 972.

In *Tinsley v. Rice*, 105 Ga. 285, 31 S. E. 174, it was said: "The protection afforded to a plaintiff under the doctrine that *lis pendens* is notice to all the world may be lost by a failure on his part to prosecute his action with due diligence": See, also, Civ. Code, sec. 3936. This ruling was in favor of one against whom the doctrine of *lis pendens* ⁸³² would otherwise operate for the benefit of the plaintiff. A similar rule would naturally apply as to the defendant's cross-complaint. The defendant cannot be charged with laches in not pressing the plaintiff's suit for him, but may be charged with laches for failing to duly press his cross-complaint. The bank holds under the plaintiff. It could hardly claim that the defendant lost whatever right existed in his favor under the plaintiff's suit, by virtue of the doctrine of *lis pendens* prior to the conveyances under which the bank holds, because the plaintiff failed to prosecute with diligence. Certainly the plaintiff could not successfully claim that, by reason of his own laches in prosecuting his action against the defendant, the latter should suffer. Can one who purchases under the plaintiff and, by intervention, becomes himself a party plaintiff, do so, if the defendant be not in laches? What duty was on him, before he filed his cross-complaint, to press the plaintiff's action? In *Fox v. Reeder*, 28 Ohio St. 181, 22 Am. Rep. 370, it was

said: "The rule itself, though undoubted, will not be applied where the party has been negligent to the injury of innocent parties. As Sugden says in an early edition of his work, the application of the rule may rest upon the question whether or not the party seeking its benefit has been 'guilty of laches.'" Different courts have used different expressions in describing the negligence or failure to prosecute duly which may cause a loss of the protection afforded under the doctrine of *lis pendens*. Some have referred to it as negligence, some as gross negligence, some as a failure to duly prosecute, some as unusual and unreasonable or inexcusable negligence in prosecuting, and other expressions have been employed. Mere lapse of time in which the party who ought to prosecute an action has failed to do so, though it may be for a considerable period, is not conclusive, but may be explained by showing a reasonable excuse for the delay: *Wickliffe's Exr. v. Breckinridge's Heirs*, 64 Ky. 427; *Watson v. Wilson*, 32 Ky. 406, 26 Am. Dec. 459; *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700, 22 N. E. 40. In *Bennett on Lis Pendens*, section 109, page 179, it is said: "The ground upon which to place the invalidity of *lis pendens* for a failure to take action in pending suits, for want of 'full prosecution,' as provided in Lord Bacon's rule, is not, as in many cases seems to be supposed, negligence merely as such, but estoppel as warranted by such negligence, and other conduct on the part of those seeking the enforcement of *lis pendens*." And this is substantially quoted by Mr. Justice Little in *Tinsley v. Rice*, 105 Ga. 285, 31 S. E. 174. Referring to the interposition by courts of equity of a bar on account of laches, it has been said that this power as exercised by courts of equity is well symbolized by the emblem of Time, "who is depicted as carrying a scythe and an hour-glass, and that while with one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed": *Graff v. Portland Town etc. Co.*, 12 Colo. App. 106, 54 Pac. 854.

Counsel for plaintiff in error urged that an intervenor took the case where he found it: *Charleston etc. R. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374. In that case it was held that an intervenor "could not be heard to make objections

to the pleadings or process which the defendant vouching him into court did not urge." He would not be prevented, however, from contesting rights asserted antagonistic to his own.

11. If Bridger as trustee wrongfully made a conveyance to secure his individual indebtedness and took a bond for title from his grantee to himself as an individual, the equitable interest would be in him as trustee, and his holding would be for the benefit of the trust estate: *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639. Aside from this, if one makes a promissory note and executes a deed to secure it, taking a bond to reconvey upon payment of the debt and remaining in possession; and if an execution against the grantee in the deed is levied on the property, what does the purchaser at such a sale acquire? Evidently the interest of the defendant in execution, whatever that may be. The continued possession of Bridger as trustee, as we have seen, gave notice to the world of his rights; and a purchaser under a sale against the grantee would acquire only the rights which the latter might have: *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1068; *Wilkerson v. Burr*, 10 Ga. 117; *Leitch v. May*, 98 Ga. 714, 27 S. E. 151. If the grantee in the security deed made a conveyance to another, the second grantee could acquire no more relatively to the debtor in possession with bond for title than the first grantee had to convey; and if the sheriff's sale was under a judgment against the second grantee, the purchaser would acquire no more than if such second grantee had made a deed to him.

12, 13. One who alleges that a levy is void for excessiveness carries the burden of sustaining his contention. It does not follow ⁸³⁴ as matter of course that, because the value of land levied on is considerably more than the amount of the execution, the levy is void. The property may be incapable of subdivision, or such as can only be levied on its entirety: *Forbes v. Hall*, 102 Ga. 47, 66 Am. St. Rep. 152, 28 S. E. 915; *Roser v. Georgia Loan etc. Co.*, 118 Ga. 181, 44 S. E. 994. In the present case, however, we think that there was enough evidence to require the submission to the jury of the question whether the property was reasonably capable of subdivision, and whether the levy was excessive. It appeared that the lot fronted fifty-five feet on a street, and extended back two hundred feet to an alley, fifteen or

twenty feet wide, which gave an outlet to another street only a short distance away, that there were houses on the lot fronting on the public street, separately numbered, and that on the rear of the lot there was one frame house containing six rooms, and two containing two rooms. All of them were dwelling-houses, and they were rented separately. Bridger testified that the entire property was worth at the time of the sale fifteen thousand dollars, and that one of the two mortgages upon it had been paid off, leaving the other outstanding. No witness expressed the opinion that the lot was capable of subdivision; yet, considering the testimony above referred to, there was enough evidence to authorize this question to be submitted to the jury rather than to be determined by the court.

Judgment reversed.

All the justices concur.

The Possession of Real Property as notice of the occupant's rights therein is considered in the note to *Crooks v. Jenkins*, 104 Am. St. Rep. 331-354.

The Law of Lis Pendens is the subject of a note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

**DUNBAR v. AMERICAN TELEPHONE AND TELE-
GRAPH COMPANY.**

[224 Ill. 9, 79 N. E. 423.]

CORPORATION—Purchase of Stock of a Rival to Prevent Competition.—If one corporation purchases a majority of the stock of another for the purpose of controlling the latter and preventing competition, the transaction is one which the courts will not uphold. (pp. 136, 138.)

CORPORATIONS, Purchase of the Stock of Another but in the Name of a Natural Person.—If the stock of one corporation is purchased by another with a view to prevent competition, the transaction is not relieved of its unlawful character by the fact that the purchase is made by and in the name of a natural person. To hold otherwise would sustain a transaction illegal in its character accomplished by indirection when it could not be done if the method were direct. (p. 136.)

TRUST—Unlawful Combinations Though There is not a Complete Monopoly.—A combination or scheme to prevent competition between corporations is unlawful, though other persons are engaged in the same business and a complete monopoly thereof will not result, if the tendency is in that direction. (p. 136.)

FOREIGN CORPORATIONS—Subjection of to the Policy of the State.—A corporation coming into the state is subject to all the rules and regulations provided by its laws, and therefore cannot have power to purchase the stock of a rival corporation for the purpose of reducing competition between them, if a domestic corporation has not such power. (p. 137.)

ONE CORPORATION cannot Become a Stockholder in Another Unless such power is given to it by its charter or is necessarily implied thereunder, especially if the purpose of the purchase is to control the management of the other corporation. (pp. 137, 138.)

CORPORATIONS—Minority Stockholders, Right to Enjoin Scheme to Acquire Stock by Rival Corporation to Prevent Competition. If a corporation, for the purpose of preventing competition between it and a rival corporation, causes a majority of the stock of the latter to be purchased for the benefit of the former, the minority shareholders are entitled to an injunction to prevent the voting of the stock so purchased. (pp. 139, 141.)

EQUITY PRACTICE—Cross-bill, When Should be Dismissed.— If the complainant in a cross-bill is merely a nominal party to the original bill against whom no relief is prayed, and he will obtain all the relief to which he is entitled if the prayer of the original bill is granted, it is proper to dismiss such cross-bill. (p. 144.)

RESCISSIO OF CONTRACT of Sale—Duty of Doing Equity. One who seeks by a bill in equity to rescind a contract of sale for fraud on the part of the purchaser must, as a condition precedent, offer to repay the purchase price. (p. 145.)

Suit by Francis W. Dunbar and six other of the minority stockholders of the Kellogg Switchboard and Supply Company against the American Telephone and Telegraph Company, Kellogg Switchboard and Supply Company, M. G. Kellogg, W. I. De Wolf, and other parties, alleging that the Kellogg company was a corporation organized in Illinois for the purpose of manufacturing, selling, hiring, leasing or otherwise procuring, owning and disposing of electric telephone and telegraph instruments of all kinds; that the complainants were a minority of the stockholders of such corporation; that the defendant De Wolf was president, the defendant Bush vice-president, and L. D. Kellogg was the secretary and treasurer of the corporation, and M. G. Kellogg its principal stockholder; that the defendant American Telephone and Telegraph Company was organized under the laws of the state of New York, but was doing business in Illinois and in many other parts of the Union; that it succeeded to the business of the American Bell Telephone Company, and defendant Fish was its president; that it owned sixty per cent of the stock of the Western Electric Company, which last-named corporation and the American Bell Telephone Company formed the Bell telephone monopoly, and as such had had exclusive control in the United States of the business of telephone and telegraph apparatus; that the defendant Fish is also a director of the Western Electric Company, which was an Illinois corporation engaged in the manufacture, buying and selling of electric apparatus, and the defendant Barton was its president and manager, and dominated by the defendant Fish; that the telephone switchboards, instruments, and other apparatus of the independent exchanges throughout the United States have been manufactured by several companies, the larger and most important of which are the Kellogg company and the Stromberg-Carlson Company of Chicago; that the business of the Kellogg company for the large independent exchanges con-

siderably exceeded that of the Stromberg-Carlson or any other company; that in order to stifle competition in trade and create a monopoly and to exact and maintain usurious and excessive rates of charges, the American Telephone and Telegraph Company conceived the illegal purpose of acquiring at least two-thirds of the stock of the Kellogg company, thereby to elect and maintain a board of directors which should not act in the interests of the Kellogg company, but, on the contrary, in the interests of the American company; that to accomplish such illegal purpose the American company intended to vote the stock so purchased to dissolve the Kellogg company, and in the meantime to conceal from the public the real facts respecting such company; that prior to January 4, 1902, the defendant Milo G. Kellogg owned three thousand three hundred and seven shares of the Kellogg company, the defendant Buckingham two hundred and sixty-two shares, the defendant De Wolf two hundred and two shares; the defendant Wright thirteen shares; that Milo G. Kellogg, being in ill-health, was then absent in California and had given a general power of attorney to the defendant De Wolf to sell and dispose of stock; that to accomplish its illegal purpose the American company caused defendant Barton to enter into a contract with De Wolf for the sale of the shares of Kellogg, and that De Wolf, as agent of Kellogg, Buckingham, and Mrs. Wright, delivered to Barton shares of the Kellogg company amounting to three thousand seven hundred and eighty-three shares, by reason of which the American company claims to own and control the same, or the voting part thereof. Various other facts were alleged tending to show the extent to which monopoly would be created, and that the shares of stock purchased were paid for by the American company and held in trust for it; that defendant Kellogg, having recovered his health and learned of the sale of the stock, disapproved of it and sought to repudiate it, but that Barton and Fish insisted upon retaining sufficient to constitute two-thirds of the stock of the company.

The bill prayed that a temporary injunction issue, to be made perpetual on the final hearing, restraining the American company, Barton, and the Western Electric Company from selling said three thousand seven hundred and eighty-three shares of the Kellogg company; also enjoining the

transfers of such shares on the books of the company; and also enjoining its voting for the purpose of dissolving the company or of controlling its action, and that the sale of such stock be set aside.

October 31, 1903, defendant Milo G. Kellogg filed a cross-bill, the allegations of which, however, were in substantial accord with those of the original bill. Demurrers to the bills were interposed for want of equity and sustained. Appeals were then prosecuted by the complainants in the original bill and in the cross-bill, resulting in the affirmance by the appellate court and further appeals to the supreme court.

Henry S. Robbins, Charles H. Aldrich, Henry S. McAuley, John S. Miller and Pliny S. Smith, for the appellants.

A. N. Waterman, Holt, Wheeler & Sidley, and Tenney, Coffeen, Harding & Wilkerson, for the appellees.

²² WILKIN, J. The theory of the original bill is, that the American Telephone and Telegraph Company of New York (called the American company) purchased a majority of the stock of the Kellogg Switchboard and Supply Company of this state (known in the record as the Kellogg company), for the purpose of suppressing competition and creating a monopoly in itself of the telephone business. The ground of the demurrer was that the allegations of the bill were insufficient to sustain the cause of action, and that complainants, being minority stockholders in the Kellogg company, could not legally maintain it.

That the American company could not lawfully make a contract for the purpose claimed is not seriously questioned, but the argument of counsel for appellees is devoted to the proposition that the traversable allegations of the bill are not sufficient to present the theory relied upon, and that complainants below are not entitled to the relief prayed. The demurrer, so far as the question thus raised is concerned, is general, and, of course, admits all the material facts well pleaded in the bill. The bill certainly is not a model of conciseness in pleading, but is justly subject to the criticism of being indefinite, uncertain and more or less evasive. We think, however, that it sufficiently shows, against a general demurrer, that the American company,

through defendant Barton and others, became the purchaser of the shares of stock with the unlawful purpose and intention of putting the Kellogg company out of business or so using and controlling it as to prevent rivalry in business and creating a monopoly, and it called for an answer from defendants. If such was the purpose and object of the purchase, the decisions of this court are full to the effect that the law will not lend its aid to accomplish the object. That is to say, if the American company had purchased a majority of the capital stock of the Kellogg company in its own name ²³ for the purpose of controlling the latter and thereby preventing competition between itself and the latter corporation, the transaction would have been one which the courts of this state would not uphold: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, 8 L. R. A. 497; *Distilling etc. Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738. Nor can it be seriously contended that a purchase by the company in the name of others, as agents or trustees, will relieve the transaction of its illegality. To hold otherwise would be to sustain a transaction illegal in its character, accomplished by indirection, when it could not be done if the methods were direct: *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. Rep. 436, 48 L. ed. 679, affirming the decision of the circuit court (120 Fed. 721).

The American company and its subcompany, the Western Electric Company, must be considered as one in determining whether the tendency of the purchase alleged in the bill would be to suppress the competition existing between the Kellogg company and the Western Electric Company in the manufacture and sale of telephone appliances, etc. Neither is it material that the Kellogg and Western Electric Companies were not the only parties engaged in manufacturing such appliances, for the reason that if such was the case, while a complete monopoly or a complete restraint of competition would not necessarily result, the tendency would be in that direction, which is sufficient to condemn the transaction as unlawful: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. 798, 8 L. R.

A. 497; *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888, 15 L. R. A. 361.

The averment of the bill to the effect that it is the purpose of the American company to suppress competition and create in itself a monopoly is further aided by the averment that Barton, through whom the purchase was made, agreed to pay, as part of the purchase price, so much per share in cash and the balance by applying thereto the pro rata proceeds of any or all bills and accounts reasonably due and ²⁴ owing to the Kellogg company on December 1, 1901, the same to be settled and paid to said seller as the same are paid and collected by said company, plainly indicating that a dissolution of the Kellogg company was contemplated, because in no other event could the American company appropriate the assets of the Kellogg company to pay a stockholder of that company for the stock purchased by the former company from him; also, that by the contract of purchase the Kellogg company should be carried on in the usual manner for the space of one year in order that bills and accounts receivable could be collected in the usual course of business, thus showing a purpose to dissolve the Kellogg company after the expiration of one year.

We have examined the briefs and arguments of counsel for the defendants, and reached the conclusion that the purpose and tendency of the purchase by the American company are sufficiently shown by the bill to be to suppress competition by that company in telephone service to the public and create in the American company a monopoly of that business.

That the American company, a foreign corporation coming into the state of Illinois, is subject to all the rules and regulations provided by the laws of this state cannot be doubted: *Hurd's Stats.* 1905, c. 32, p. 501, sec. 26; *Stevens v. Pratt*, 101 Ill. 206; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738; *Coler v. Tacoma Ry. etc. Co.*, 64 N. J. Eq. 117, 53 Atl. 680. The question here, therefore, is whether the American company, if it had been organized in this state, would have had the power to purchase a majority of the stock of the Kellogg company for the purpose of controlling the latter, and that question, as we have

already indicated, has been frequently decided in the negative by this court. The decisions in other states are to the same effect: *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, 20 S. W. 427, 18 L. R. A. 252; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 114. In *Pearson v. Concord R. R. Co.*, 62 N. H. 537, 13 Am. St. Rep. 590, it was said: "A corporation ²⁵ cannot become a stockholder in another corporation unless such power is given it by its charter or is necessarily implied in it, especially if the purchase be for the purpose of controlling or affecting the management of the other corporations": *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 5; *Great Eastern Ry. Co. v. Turner*, L. R. 8 Ch. 149. These authorities fully sustain the position that the purchase by the American company, either in its own name or in the names of others, of the majority stock of the Kellogg company with the purpose and intent of controlling the latter and putting it out of business as a competitor of the American company and its subcompany, the Western Electric Company, was an attempt to exercise a power which it did not have. To permit it to do so would be against the law of this state and its public policy: *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, 30 N. E. 399; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183, Illinois cases above cited.

The courts below, as we understand their decision, do not uphold the contract of purchase by the American company as one made by it in its own name; nor do we understand counsel for appellees to contend that under the facts alleged in the bill such a purchase could have been lawfully made. It is attempted, however, to show that, inasmuch as the purchase was made in the names of others and the legal title to the stock vested in them, the strict doctrine of *ultra vires* has no application. A court of equity will look through all devices to discover and afford relief against the real situation, and we shall hereafter, in considering another branch of the case, have occasion to cite more at length the authorities bearing on this question. For the present it will be sufficient to cite *Central R. R. Co. v. Pennsylvania Co.*, 31 N. J. Eq. 475, where a bill was filed by a railroad company to enjoin another from building tracks across the complaining company's tracks, and it was

alleged that the defendant had, through its nominees and employés, effected ²⁶ the incorporation of another corporation for the purpose of building said tracks. A writ of injunction being granted, the court said: "A corporation cannot in its own name subscribe for stock or be a corporation under the general railroad law; nor can it do so by a simulated compliance with the provisions of the law through its agents, as pretended corporators and subscribers of stock." We have fully considered the reasoning of the chancellor on this branch of the case which was adopted by the appellate court, and have reached the conclusion that it is based upon a distinction without a legal difference. If, as a matter of fact, the object and purpose of the purchasing company was to acquire such ownership in the Kellogg company as would enable it to control the latter, then, whether it did so by a direct purchase in its own name or through the intervention of agents or trustees, the want of power was the same, and the purchase was strictly ultra vires, no matter what the device may have been.

The remaining important question to be considered is whether the complainants below, minority stockholders in the Kellogg company, can maintain this bill. If we are correct in the view that the object of the American company was illegal and that its attempt to acquire ownership of the stock in the Kellogg company was absolutely null and void as being in excess of its chartered powers, then it would seem to follow that each and every stockholder in the latter company would have the right to say that the American company, assuming to own stock which it did not, and could not, legally own and vote at any meeting of the Kellogg company in the management and control of its business, should be restrained. In other words, every lawful owner of stock in a corporation has the right to say that others assuming to vote shares of stock which they do not have the legal right to vote, shall be restrained. This, we assume, must be admitted, and such is the logical effect of the decision of this court in *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048.

²⁷ In *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, 20 S. W. 427, 18 L. R. A. 252, the supreme court of the state of Tennessee, in passing upon the question whether shares of stock in a corporation of that state en-

gaged in a similar business transferred to a trustee chosen by the purchasing corporation for its use and benefit were legally transferred, said: "The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to manage and control the business of the Tennessee company in the interest of the Ohio company. There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority, that it had no implied authority to purchase and hold shares, either in its own name or in that of a trustee, for the purpose of controlling another corporation. . . . The purpose and intent in granting the charter is, that the corporation shall carry on its business through its own agents, and not through the agents of another corporation. The public policy of this state will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly. The result is, that this purchase of shares for the express object of controlling and managing another corporation was ultra vires, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the courts of the state, when such aid is invoked in furtherance of the unlawful agreement": *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 114; *De La Vergne R. M. Co. v. German Savings Inst.*, 175 U. S. 40, 20 Sup. Ct. Rep. 20, 44 L. ed. 65.

Pearson v. Concord R. R. Co., 62 N. H. 537, 13 Am. St. Rep. 590, was a bill by a stockholder of the Concord Railroad Company against the Northern Railroad Company, in the decision of which case the court used the following language: "The court finds that the Northern Railroad Company is the owner of twelve hundred and ninety ²⁸ shares of Concord railroad stock purchased in 1873, upon which it has since voted at the meetings of the Concord railroad. A corporation cannot become a stockholder in another corporation unless such power is given it by its charter or necessarily implied in it, especially if the purchase be for the purpose of controlling or affecting the management of the other corporation. . . . It [the Northern railroad] can no more make a permanent investment of funds in the stock of

another road than it can engage in a general banking, manufacturing or steamboat business. It is neither incidental to the purposes of its incorporation nor necessary in the exercise of the powers conferred by its charter. If it can purchase any portion of the corporation stock of the Concord company it may buy up the whole, and thus engage in a business for which its charter gives it no authority. And what will hinder a banking corporation from becoming a manufacturing company, or a manufacturing company from becoming a railroad common carrier? But the facts in this case go further. The stock was bought at one hundred and five dollars or one hundred and six dollars per share (par value fifty dollars), a price largely in excess of its market value, and for the purpose of obtaining control of the Concord company and securing more favorable contracts to itself."

Many other cases might be cited in support of the position that all such contracts are ultra vires and void.

Nor do we think it can be said in this case there was a mere exercise of an excess of power rendering the transaction merely voidable and not an absolute nullity. We said in *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477, a case in which there had been a mere excess of power (page 243): "Had the corporation been clothed with no power to acquire real estate in this state, or if the purchase had been prohibited by statute or contrary to the manifest policy of our laws, a different question would be presented, and the cases of *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632, and *Starkweather v. American Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133, might properly be invoked as ²⁹ authority. But such is not the case." Consequently it was held that relief could not be granted at the instance of a private individual, as was held in *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632, and *Starkweather v. American Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133, cases referred to, the remedy in the *Barnes-Suddard* case (117 Ill. 237, 7 N. E. 477), being only at the instance of the public authorities. In the one case a title vests which may be set aside; in the other the whole transaction is null and void.

But aside from the question as to whether the contract of purchase was ultra vires in the sense that the contract became a nullity, we think that such equitable rights are

shown in the complainants, though minority stockholders, as ought to entitle them to maintain this bill. It is alleged in the bill, and admitted by the demurrer, that in order to stifle competition in trade and create a monopoly in itself and its licensee company, and for the purpose of enabling it to secure and maintain unreasonable and excessive rates and charges, said American company conceived the illegal purpose of acquiring at least two-thirds of the stock of said Kellogg company, and through such ownership to select and maintain a board of directors which should act in the real interests of and subservient to the American company and free that company and its licensee from the competition of the Kellogg company and independent exchanges; also, that its ultimate purpose was to injure and finally destroy the Kellogg company. That such conduct on the part of the American company was fraudulent as against the stockholders of the Kellogg company cannot be denied, and against which, on the plainest principles of equity, a stockholder in the Kellogg company should have the right to relief: *Menier v. Hooper Tel. Works*, L. R. 9 Ch. 350. And, on principle, *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Wheeler v. Pullman Iron etc. Co.*, 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527, and *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, are in point.

³⁰ In *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108, 7 L. R. A. 605, the bill was by stockholders representing a minority of the stock of the Memphis company, and the case was submitted to the court below on a demurrer and motion to dismiss the bill and to dissolve the injunction, which the court overruled and the company prosecuted an appeal. In the decision of the case the supreme court held that where a corporation has acquired the majority of the stock of another corporation, its officers, directors or others acting in its interest may be enjoined from exercising the voting power that the majority of the stock confers, so as to govern and control the management of such other corporation, especially when the two corporations have the same field of action and operation and the profits of one may be advanced by lessening those of the other, and where their interests are conflicting as to

expenditures and division of earnings. In many respects that case is similar to the one at bar. In the opinion it is said: "We come, then, to the naked inquiry, can one corporation acquire a majority of the stock of another corporation, and by the exercise of the voting power the majority of stock confers, govern and control the management of such corporation?" And the question was answered in the negative: See *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 South. 408.

In *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 20, minority stockholders, on behalf of themselves and others, sought to enjoin another railroad company from voting. The injunction was granted, the court holding that the purchase was against public policy, and used this language: "In the case under consideration the New York, Lake Erie and Western company have acquired, by purchase, the majority of all the stock issued by the Buffalo, New York and Erie railroad. If its officers are permitted to vote thereon they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie and Western Railroad Company to have the Buffalo, New York and Erie company managed³¹ and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow-stockholders, and if so, they have a right to complain": See, also, *Parson v. Tacoma Smelting etc. Co.*, 25 Wash. 492, 65 Pac. 765.

In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, one bank purchased certificates of stock in the other and sought to have the same transferred upon its books, which was refused, whereupon the bank claiming to have purchased the stock brought an action against the other for conversion, based on refusal to make the transfer, but the court denied the relief, saying: "There would seem to be little doubt, either upon principle or authority and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute. . . . Were this not so, one corporation, by buying up the majority of the shares of stock of another, could take the entire management of its business, however foreign such business might be to that

which the corporation so purchasing said shares was created to carry on. . . . Its action in refusing the transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs. To the claim of the plaintiff that it was the duty of the defendant to make the transfer when the same was demanded and leave the state to impose the penalty of forfeiture on the plaintiff for a violation of its charter, we do not assent. The cases of *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, and *Jones v. Guarantee etc. Co.*, 101 U. S. 622, 25 L. ed. 1030, and cases therein cited, do not support such proposition. The principle of those cases is, that where a corporation is incompetent, by its charter, to take a title to real estate, a conveyance to it is not void, but voidable only. and that the sovereign alone can object; that the conveyance is valid unless assailed in ^{as} a direct proceeding instituted for that purpose. But they neither, by the principle maintained nor by the reasoning advanced in support of it, sanction the doctrine that one corporation may buy up the stock of another and thereby enable itself to interfere with the internal management of its affairs, especially where the power to do so is expressly prohibited by its charter."

Other authorities, some of which have been already cited, are to the same effect.

There are other grounds upon which the complainants' right to maintain this bill may be placed, but we do not feel called upon now to extend this opinion for the purpose of pointing them out. Three separate, independent, lengthy briefs and arguments have been filed on behalf of appellants, which have unnecessarily increased the labor of reviewing and deciding the case. We have endeavored only to point out the substantial grounds upon which we hold the defendants to the original bill should have been required to answer the same.

We think the decree of the circuit court sustaining the demurrer to and dismissing the cross-bill is right and should be affirmed. No necessity whatever for that bill is shown. At most, Milo G. Kellogg was a mere nominal party to the original bill. No relief was prayed against him, and if a decree granting the prayer of that bill had been rendered he would have obtained all he was in equity entitled to. More-

over, as a bill to set aside the contract of sale for the fault or misconduct on the part of his attorney, De Wolf, he does not offer to place the purchaser in statu quo.

The decree, in so far as it sustains the demurrer to the cross-bill, will be sustained, but for the error in sustaining the demurrer to the original bill, the decree will be reversed and the cause remanded, with directions to proceed in conformity with the views herein expressed.

Decree affirmed in part.

²³ Afterward, on consideration of the petition for rehearing in this case, the following additional opinion was filed:

Per CURIAM. "The object and purpose of the cross-bill is to rescind the sale of Kellogg's shares of stock on the ground of fraud. In order to entitle him to that relief he must have shown by his bill that he promptly disaffirmed the sale upon discovering the alleged fraud and offered to refund the purchase price which he received therefor or give some sufficient legal excuse for his failure to do so, and in this respect his cross-bill is fatally defective. The rule in this state is, that a party who seeks by bill in equity to rescind a contract of sale for fraud on the part of the purchaser, must, as a condition precedent, offer to repay the purchase price. In other words, he must, before filing his bill, offer to restore the purchaser to the same position he was in before the sale was made. The contract is not void, but only voidable at the election of the defrauded party: *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158. And it was there said (page 662): "The complainant then having failed to show that prior to the filing of his bill he elected to rescind the transaction or agreement complained of, or took any of those steps which are legally necessary to effectuate a rescission, it must be held that, so far as is shown by the bill, said transaction remains in full force and that the complainant is entitled to no relief based upon the theory of its rescission." The rule is clearly stated by Judge Gary in *Duncan v. Humphries*, 58 Ill. App. 440, that to lay the foundation for a bill to rescind a contract, the complainant must, before the commencement of his suit, offer and be willing to perform such acts on his part as will restore the defendant to the position which he occupied before the transaction: Citing *Rigdon v. Walcott*, 141 Cal. 649, 31 N. E. 158. It is not sufficient to make the offer in the bill.

The judgment of the appellate court as to the cross-bill is right and will be affirmed.

Unlawful Trusts and Monopolies are considered in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235.

The Consolidation of Corporations is considered in the note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604; and the sale by a corporation of all its property and assets is considered in the note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548.

The Right of One Corporation to Acquire Stock in another is considered in the note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 137. See, too, the recent case of *McCampbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, and authorities cited in the cross-reference note thereto.

Actions by Stockholders on Behalf of Their Corporations are considered in *Johns v. McLester*, 97 Am. St. Rep. 29.

BROWN v. TRUSTEES OF SCHOOLS.

[224 Ill. 184, 79 N. E. 579.]

LIMITATION OF ACTIONS—Against the State.—Statutes of limitation do not run against the state in respect to public rights, unless it is expressly within the terms of the statute. (p. 147.)

LIMITATION OF ACTIONS—Minor Municipalities.—The rule that statutes of limitation do not run against the state applies in favor of minor municipalities created by it as well as to local governmental bodies in respect to governmental affairs affecting the general public. The exemption extends to counties, towns and minor municipalities in all matters respecting strictly public rights as distinguished from private or local rights, but as to matters involving private rights, they are subject to the statute of limitations to the same extent as individuals. (pp. 147, 148.)

LIMITATION OF ACTIONS—School Districts.—Statutes of limitation run against trustees of school districts with respect to property held by them in trust for the use of the free public schools of the district, because the people of the state in general have no interest in common with the inhabitants of the school district in the schoolhouse site. (pp. 149, 150.)

Outten & Roby, for the appellant.

J. B. Moffett, for the appellees.

¹⁸⁵ CARTWRIGHT, J. This is an action of ejectment brought by the appellees, against appellant, in the circuit court of Macon county, to recover possession of part of a schoolhouse lot to which appellees held the legal title, for the use of school district No. 90, in said county. Appel-

lant's plea was not guilty and ¹⁸⁶ the defense was the statute of limitations of twenty years. The cause was submitted to and tried by the court upon an agreed statement of facts showing adverse possession of the premises for more than twenty years. Appellant and his predecessors in title to the adjoining lands had been in the open, exclusive and adverse possession of that part of the schoolhouse lot in controversy for more than twenty years, and it had been inclosed by a fence, and a portion of it had been used for an orchard and another portion for a garden. The possession of appellant was such as would have barred the action if the statute of limitations applies to trustees of schools in respect to lands held for the use of a school district. Appellant submitted to the court propositions of law to the effect that the action would not lie because of the adverse possession, and that the title and possession of appellees were subject to the limitation laws of the state. The court refused to hold the propositions to be the law and found the defendant guilty, and entered judgment that the appellees recover the premises.

Statutes of limitation do not run against the state, in respect to public rights, unless the state is expressly included within the terms of the statute. The rule is founded on the maxim of the common law, *Nullum tempus occurrit regi*. It was supposed that the time and attention of the sovereign were occupied by the cares of government, and there could be no negligence or laches on his part. The same prerogative extends to the state, in its sovereign capacity, as to all governmental matters. As to them no delay in resorting to the remedy will bar the right; but if the state becomes a partner with individuals, or engages in business, it divests itself of its sovereign character and is subject to the statute: *Governor v. Woodworth*, 63 Ill. 254. In such relations it does not exercise sovereignty, but acts merely as an individual and cannot claim the exemption. The rule that statutes of limitation do not run against the state also extends to minor municipalities created by it as local governmental ¹⁸⁷ agencies, in respect to governmental affairs affecting the general public. The exemption extends to counties, cities, towns and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but as to matters involving private

rights they are subject to statutes of limitation to the same extent as individuals: *Logan County v. City of Lincoln*, 81 Ill. 156; *County of Piatt v. Goodell*, 97 Ill. 84; *School Directors v. School Directors*, 150 Ill. 653; *People v. Town of Oran*, 121 Ill. 650, 13 N. E. 726; *Greenwood v. Town of Lasalle*, 137 Ill. 225, 26 N. E. 1089; 19 Am. & Eng. Ency. of Law, 2d ed., 181, 191.

The question in this case is whether there is an implied exemption from the statutes of limitation in favor of trustees of schools with respect to property held for the use of a particular school district, and that depends upon the meaning of the term "public rights," as used in the decisions. In one sense, all property held by a municipal corporation is held for public use, and the public at large, or some portion of the public, have rights or interests in such property. It may be held for the use of the people of the state generally, or the use may be limited to the inhabitants of the local subdivision or municipality, such as the city, village or school district, and the question whether the statute applies in the latter class of cases was considered in *County of Piatt v. Goodell*, 97 Ill. 84. That case involved the title to swamp lands owned by the county, in which the inhabitants of the county were interested. It was held that the public right and public use must be in the people of the state at large, and not in the inhabitants of a particular local district. It was said that there is a well-founded distinction between cases where the municipality is seeking to enforce a right in which the public in general have an interest in common with the people of such municipality, and cases where the public have no such interest; that the public generally had no interest in the tract of land in question in that case in common with ¹⁸⁸ the voters and taxpayers of Piatt county, and that the county for that reason was subject to the limitation laws.

There are numerous cases where it has been held that municipalities or minor political subdivisions of the state are not subject to limitation laws in respect to streets and public highways (*Lee v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759); but streets and highways are not for the use of the inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people in that state. Such rights are clearly distinguishable from the

rights or interests of the inhabitants of a locality in property acquired for a mere local use, such as city offices, a library site or the use of a fire department. Such property is held and used for strictly local purposes. In *Greenwood v. Town of Lasalle*, 137 Ill. 225, 26 N. E. 1089, where it was held that an action by the town to recover taxes was not barred by any statute of limitation, the taxes were levied for purposes in which the public generally are directly interested, such as repairing bridges, roads or causeways, in which the public at large are as much interested as the people of the township. In the case of *Trustees of Commons v. McClure*, 167 Ill. 23, 47 N. E. 72, it was held that the statutes of limitations did not run against the state itself in respect to the commons held in trust for a portion of the general public, where there was no power, except in the state, to authorize a diversion of the lands to any use different from that provided for in the grant; but it was said that the court did not wish to be understood as holding that if the inhabitants of the village of Kaskaskia had been incorporated and endowed by the state with full authority to divide, divert and convey the commons, or any part thereof, in fee, the statute of limitations would not run against them as in other cases. It was there held that the state could not, by mere lapse of time, be barred from the exercise of its sovereign power in respect to the alienation of the lands, although the trust was for the benefit of a portion, only, of the general public, but the court declined to hold that a municipality¹⁸⁰ would be exempt under the same circumstances. That decision was based on the prerogative of the state as a sovereign.

By section 31 of the act to establish and maintain a system of free schools the trustees of schools of a township are invested with the title, care and custody of all schools and schoolhouse sites, but the supervision and control of such schools and schoolhouse sites are vested in the directors of the particular district. The trustees are required by section 32 to sell and convey any schoolhouse site which has become unnecessary, unsuitable or inadequate for a school, on petition of a majority of the voters of the district, and the proceeds of the sale are to be paid over to the township treasurer for the benefit of the school district: *Hurd's Stats.* 1905, p. 1796. The people of the state in general have

no interest, in common with the inhabitants of a school district, in the schoolhouse site or the proceeds of it. The use and the right are confined to the particular local district, and under the decision in *County of Piatt v. Goodell*, 97 Ill. 84, the statute of limitations was a good defense.

The judgment is reversed and the cause remanded.

WILKIN, J, Dissenting. I do not understand that the right of action in plaintiffs below is barred by limitation. They proved a fee simple title in themselves for the use and benefit of the public. Section 32 of the school law (Hurd's Stats. 1899, c. 122, p. 1526) provides that the school business of the township shall be done by three trustees to be elected by the legal voters of the township, as thereafter provided for. Section 33 makes said trustees a body politic and corporate by the name and style of "Trustees of schools of township No. ———, range No. ———," according to the number, and provides that such corporation shall have perpetual existence, shall have power to sue and be sued, to plead and be impleaded in all courts and places where judicial proceedings are had. ¹⁰⁰ Section 60 authorizes the trustees of schools in each township in the state to receive any gift, grant, donation or devise made for the use of any school or schools or library, or other school purposes, within their jurisdiction, and provides that "they shall be and are hereby invested, in their corporate capacity, with the title, care and custody of all schoolhouses and schoolhouse sites; provided, that the supervision and control of such schoolhouses and school sites shall be vested in the board of directors of the district." Section 61 authorizes the trustees, when in the opinion of any board of directors the schoolhouse site or any buildings have become unnecessary or unsuitable or inconvenient for a school, on petition of a majority of the voters of the district, to sell and convey the same in the name of said board, after giving at least twenty days' notice of such sale by posting up written or printed notices thereof particularly describing said property and the terms of sale.

It has always been the doctrine of this court that the statute of limitations does not run against a municipal corporation in respect to property held for public use. I do not think it can be said the trustees of schools do not hold property the title to which is vested in them for school purposes,

for the public use. Such property is held for the benefit of all the people of the school district. It cannot be sold by the trustees without the petition of a majority of the voters in the district. They have no power to dispose of the fee to such property or convey it away at their own will and independently of the will of a majority of the voters. A sale or conveyance by them, otherwise than upon the petition required by the school law, would be a plain violation of duty. The public have an interest in the land in common with the citizens and taxpayers of the district and township. The laws providing for public schools are passed in pursuance of the constitutional provision that "the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common ¹⁹¹ school education": Const. 1870, art. 8, sec. 1. The public school of each township or district is a part of the common school system of the state, and the interest of the public in it is as broad as the system itself. In *Logan County v. City of Lincoln*, 81 Ill. 156, this court said: "Our understanding of the law is, that as respects all public rights, or as respects property held for public use upon trusts, municipal corporations are not within the operation of the statute of limitations; but in regard to contracts or mere private rights the rule is different, and such corporations, like private citizens, may plead or have pleaded against them the statute of limitations": See, also, *Martel v. City of East St. Louis*, 94 Ill. 67; *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176, 69 N. E. 230. Here the school trustees, as a municipality, held this school lot not in a private capacity, nor do they hold the fee with unlimited power of disposal. The power of disposal is subject to the will of a majority of the voters of the school district. In my opinion the trustees cannot, by mere neglect of duty or laches, deprive the public of its right to the property. Section 8 of our statute of limitations expressly excepts such property from the operation of the seven years' limitation.

I think the judgment below should be affirmed.

Adverse Possession of property of a public character is considered in the notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479; *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 775.

The Maxim "*Nullum Tempus Occurrit Regi*" is the subject of a note to *Bannock County v. Bell*, 101 Am. St. Rep. 144.

DARST v. SWEARINGEN.

[224 Ill. 229, 79 N. E. 635.]

WILLS, Property Given to Heirs by, When Deemed to be Personal Property.—A devise of real property to be converted into money and the money to be distributed among the devisees is to be treated as a devise of money and not as of land, though the devisees may, by their unanimous concurrence, elect to take land instead of money. (p. 154.)

WILLS, Property Given to Heirs When Deemed to be Vested in Them by Descent.—A devise giving the devisee precisely the same estate and interest in the property as he would have taken by descent is void, for the reason that title by descent is regarded as worthier and better than title by purchase. (p. 154.)

WILLS—Devise to Heirs, When Does not Vest in Them by Descent.—If a devise is made by the testator's heirs and there is a difference in kind or quality of the estate or property to be passed under the devise from that which would descend to them by the statute, they must be held to take by devise and not by descent. (p. 154.)

EXECUTION, Interest of the Devisee, When Subject to.—If a testator devises all his real estate occupied as a homestead to his wife for life, and within two years after her death to be sold, the proceeds to be equally divided among his six children, they take no vested interest in such property on the death of the testator, but only a right to money when the land shall be sold as directed, and the interest of one of them is not subject to levy and sale under execution, and such levy and sale are void. (p. 155.)

W. W. Hammond and H. V. Foster, for the appellants.

Lillard & Williams, for the appellee.

231 WILKIN, J. On July 12, 1882, Joseph B. McCorkle died testate. The fourth clause of his will was as follows:

"I give and bequeath to my wife, Cynthia Ann McCorkle, my homestead or home place, with all its appurtenances thereunto belonging, and all the land described as belonging to me in sections 18 and 19, Tp. 26, N. R. 1 W. 3d P. M., Olio Tp., Woodford county, Illinois, to have and to hold during her natural lifetime, and within two years after her death the above-described homestead and lands I will to be sold and the proceeds to be equally divided between my six children, viz.: Maria Josephine Poynter, Richard Henry McCorkle, Orpha Jane Hedrick, Eunice Adele McCorkle, Missouri (or Zuie) Amanda McCorkle, Cyrus Byron McCorkle."

The widow and six children named in this clause were testator's sole heirs at law. The will was admitted to pro-

bate by the county court of Woodford county on August 10, 1882, but the executor named therein failed to qualify. The widow occupied the homestead until her death, on August 16, 1905.

On June 15, 1900, Orpha Jane Hedrick, a daughter, in consideration of twelve hundred dollars, assigned to appellee, Ezra F. Swearingen, her estate in all moneys derived from the sale of the ²³² real estate described in the fourth clause. On April 4, 1897, J. P. Darst, L. C. Darst and G. W. Darst, partners doing business as J. P. Darst & Co., obtained a judgment in the circuit court of Woodford county against Orpha J. Hedrick and others. An execution was issued and levied upon the share of Orpha Jane Hedrick in the real estate above described and the same was sold by the sheriff in satisfaction thereof. No redemption was made from this sale, and on June 26, 1905, the sheriff issued a deed conveying said interest to appellants, J. P. Darst & Co. On December 8, 1905, appellee, Ezra F. Swearingen, filed his bill in the circuit court of Woodford county against J. P. Darst & Co., and the six children of Joseph B. McCorkle, in which he alleged the above facts; also that no title was vested in Orpha Jane Hedrick at the time of said judgment, levy and sale; that the time had arrived when said homestead property should be sold and the proceeds divided, and that the sheriff's deed was void and a cloud upon complainant's title. The prayer of the bill was, that a trustee should be appointed to sell said real estate; that the sheriff's levy, sale and deed be set aside, and that the master in chancery be directed to sell the property and distribute the proceeds, giving to appellee, Swearingen, the share of Orpha Jane Hedrick. A demurrer to the bill was filed by J. P. Darst & Co., which was overruled, and they electing to stand by their demurrer, a decree was entered in accordance with the prayer of the bill. From that decree this appeal is prosecuted.

The only question for our determination is whether Orpha Jane Hedrick took, under the fourth clause of the will, real estate or personal property. On behalf of appellants it is claimed that she took real estate subject to levy and sale by judgment creditors; on the other hand, appellee contends that it became personal property under the will, and that the title to the same, as realty, did not vest in her.

We have held in a great many cases that a devise of real estate which by the provisions of a will is to be converted ²³³ into money and the money distributed among the devisees is to be treated as a devise of money and not of land, and that the devisees may elect to take the land itself instead of the money. The character of the devise cannot, however, in such case be changed from money to land without the concurrence of all of the devisees. This doctrine was first decided in the early case of *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, and has been followed in numerous subsequent cases, among which are *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; *English v. Cooper*, 183 Ill. 203, 55 N. E. 687, and *Starr v. Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A., N. S., 623.

But it is claimed by appellants that there is a distinction between cases where the direction is to sell and divide the proceeds among a class of persons other than the testator's heirs or in different proportions from the statutory inheritance, and cases where the heirs of the testator are beneficiaries in the same proportions they would take by descent, and they insist this case falls within the latter class. There can be no question but the distinction insisted upon exists; that a devise giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a worthier and better title than a title by purchase: *Kelett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. But this rule is not applicable where there is a difference in kind or quality of the estate or property to be passed under the devise from that which would descend under the statute. Where there is a difference in either the amount or quality of the interest taken the rule is not applicable. Had Joseph McCorkle died intestate his widow would have taken homestead and dower in the lands in question, and the six children would have taken, at the moment of his death, the intestate lands as real estate, subject to the widow's dower and homestead. The title would immediately have vested in them and been subject to levy and sale on an execution of a judgment creditor. By the terms of this will the homestead of the widow was merged in other property without ²³⁴ assignment of homestead and in lieu of dower. Both the homestead and dower rights of

the widow were thrown together. Her property, therefore, as it descended under the will was entirely different from what it would have been if she had taken under the statute. The six children, instead of inheriting the land subject to the assignment of dower and homestead, as provided by the statute, took no vested estate at the death of their father, but only a right to money when the land should be sold within the two years after the death of the widow. It will readily be seen, therefore, that there was a marked difference between the title given under the will and that which would have been derived under the statute, and therefore the case does not fall within the rule sought to be invoked by appellants.

The interest of Orpha Jane Hedrick under her father's will was a money interest, and not real estate. The levy and sale were therefore void.

We find no reversible error, and the decree of the circuit court will be affirmed.

Wills Devising or Bequeathing to an Heir what he is entitled to under the law of succession, in the absence of a will, are considered in the note to *Akers v. Clark*, 75 Am. St. Rep. 154.

The Liability of an Heir or Devisee for the debts of his ancestor is considered in the note to *Crawford v. Turner*, 112 Am. St. Rep. 1017.

WHITE v. HORN.

[224 Ill. 238, 79 N. E. 629.]

ESTATES OF DECEDENTS—Limitation of Time Within Which to Apply for an Order to Pay Debts.—In the absence of a legislative rule upon the subject an application for an order to sell lands of a decedent to pay his debts must be made within seven years unless the delay is satisfactorily explained. If the circumstances show good reason for the delay, a very much longer time will not bar the proceedings. (p. 158.)

ESTATES OF DECEDENTS—Laches in Executing an Order to Sell Real Estate to Pay Debts.—An order to sell land to pay debts amounts to no more than a lien which should be enforced within the time allowed for the enforcement of judgment liens. If the order is not enforced within seven years, the parties may be brought before the court at any time within twenty years, and, in a proper case, the order may be revived and enforced; but it should not be enforced after twenty years where the only excuse for delay is that the lands were of so little value during such twenty years that they were worth nothing in the market, but their value had recently been much enhanced. (pp. 159, 160.)

Williams & Williams and Paul F. Grote, for the appellants.

Edward Doocy and William Mumford, for the appellees.

²⁴¹ CARTWRIGHT, J. Thomas Cochran, at the time of his death, on June 18, 1876, was the owner of two tracts of land in Pike county, one containing thirty-two acres and the other seventy-five and seventy-five hundredths acres. He left no descendant, and the heirs were his widow, Ethalinda Cochran, and collateral relatives. The lands were subject to the dower of the widow, and she took one-half in fee as heir, subject to the dower. John B. Horn, one of the appellees, was appointed administrator on August 18, 1876, and claims were allowed against the estate in excess of the personal assets to the amount of three thousand six hundred dollars. The creditors presented to the court their petition for a citation against the administrator to compel him to sell the real estate to pay the debts, and on June 30, 1880, he filed his petition for that purpose. On October 22, 1880, an order of sale was entered, and by virtue of that order the lands were sold on January 22, 1881, the thirty-two acre tract bringing one hundred and eighty-seven dollars and fifty cents and the seventy-five and seventy-five hundredths acre tract seventy-five dollars. A report of the sale was made, which the county court refused to approve because of the inadequacy of price. The sale was set aside and the administrator was ordered to again advertise and sell the lands. No further attempt to sell the lands was made and nothing was done by the creditors to compel a sale until March 22, 1904, when appellants, who are creditors of the estate, presented to the county court their petition in this case for a citation to the administrator to show cause why he should not proceed to sell under the original order. John B. Horn and Ethalinda Cochran, the appellees, demurred to the petition, and their demurrer was overruled and an order was entered directing the appellee Horn to sell the real estate ²⁴² in pursuance of the original order. Appellees appealed to the circuit court, where they again demurred to the petition, and the demurrer was overruled. Appellee Horn then filed his answer, alleging that the judgments of appellants were barred by limitation and by their negligence and laches; that the proceedings for the sale

were long ago abandoned and the case was off the docket of the county court, and that appellants had allowed the widow to expend large sums of money to improve the land and were estopped to assert any rights antagonistic to her. The circuit court heard the cause and entered an order requiring the appellee to advertise the lands and proceed to sell the same under the order entered October 22, 1880. Appellees appealed to the appellate court for the third district, and that court reversed the order of the circuit court. From the judgment of the appellate court appellants have brought the case here by appeal.

The petition for the enforcement of the order of sale was filed more than twenty-three years after the order was entered, and alleged as an excuse for the delay that both tracts were encumbered by dower rights of the widow, and that the seventy-five and seventy-five hundredths acres were swamp lands in a drainage district and of little value, and that the lands have recently become valuable. The petition further alleged that the widow was in possession of all said lands from the death of her husband; that on October 23, 1893, she conveyed the seventy-five and seventy-five hundredths acre tract to Peter Brown, and thereby her dower right in that tract was extinguished; that on January 10, 1895, Brown procured a deed from the commissioners of the drainage district, who had bought said tract for levee and other taxes on June 4, 1883; that on September 7, 1895, Brown and wife quitclaimed the premises to the widow, and on July 11, 1902, she also received a deed from Isaac Strauss and wife, who had bought the tract at a tax sale on June 13, 1898. One of the petitioners testified that the lands were of little value prior to the settlement, in 1902, of a bond suit in the United States court against the drainage district, and before that ²⁴³ settlement would not have sold for enough, subject to the widow's dower, to pay for the cost of the proceeding. The petition alleged that the widow had contracted a sale of part of the premises for three thousand six hundred dollars and had filed a petition to quiet title as against petitioners.

The principal question presented is whether a petition to enforce the execution of an order of sale to pay the debts of an estate will be entertained after the lapse of twenty-three years from the time it was entered. There is

no statute limiting the time within which an administrator shall file a petition for leave to sell land to pay debts nor within which he shall proceed to execute the order of sale after it has been entered. The question within what time the petition shall be filed has often been considered, and a period has been fixed which was adopted in analogy to statutes of limitation relating to liens of judgments. In the absence of a legislative rule fixing a definite period of limitation it has uniformly been held that the application must be made within seven years, unless the delay is satisfactorily explained. If the circumstances show good reason for a delay, a very much longer time will not bar a proceeding: *Rosenthal v. Renick*, 44 Ill. 202; *Moore v. Ellsworth*, 51 Ill. 308; *Bursen v. Goodspeed*, 60 Ill. 277; *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631; *People v. Lanham*, 189 Ill. 326, 59 N. E. 610; *Graham v. Brock*, 212 Ill. 579, 103 Am. St. Rep. 248, 72 N. E. 825.

Counsel for appellants contend that the rule so established does not apply to an order of sale; that the proceeding is in rem, and a judgment of that kind does not fall within any statute of limitation, and that the order may be executed at any time, however remote. While counsel are correct in saying that there is no statute governing the time within which the order may be executed, it is equally true that there is no statute fixing the time within which the application shall be made, and that practically the same reasons which induced the establishment of the rule in one case apply to the other. The law gives to creditors of an estate a lien on the real estate to be enforced by the administrator for their benefit; ²⁴⁴ but the lien is not perpetual, and may be lost by gross laches or unreasonable delay (*Vansyckle v. Richardson*, 13 Ill. 171), and there seems to be no valid reason why the lien should be perpetual after it has taken the form of an order of sale. It is the often-declared policy of the law that titles to real estate shall be secure, and courts have not hesitated to apply rules, based on the analogies of statutory law, to prevent insecurity of such titles. In the case of a sheriff's certificate of sale, although there was no statutory limitation, the court applied a rule, drawn from the analogies of the law, that the deed must be made within a reasonable time; that such time was the seven years within which

the judgment was a lien, adding thereto fifteen months allowed for redemption, and that if the application for a deed was not made within that time it must be made through the court, on notice to the parties. The court was inclined to hold that a period of twenty years should be considered an insuperable bar to the relief prayed for: *Rucker v. Dooley*, 49 Ill. 377, 99 Am. Dec. 614. The court in that case mentions other examples where a limitation had been adopted without legislation, and reiterates the declaration of a former opinion: "In short, the policy of our law is repose and security of titles and estates against dormant claims."

Where the only effect of an order to sell lands to pay debts is to subject the lands to sale for that purpose, the order amounts to no more than a lien, and payment of the claims will relieve the lands from the effect of the order. The heir, in such a case, may pay the debt and relieve the lands from the charge: *Richie v. Cox*, 188 Ill. 276, 58 N. E. 952. By statute a judgment is a lien upon land for seven years if execution has been issued within a year, and no longer. When the judgment has become dormant it may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years after the date of the judgment, and not afterward. Actions for the recovery of lands held adversely are barred in seven years under some circumstances and in ²⁴⁵ other cases in twenty years. Petitioners seem to have recognized that the order of sale had become dormant, and could not properly be executed without bringing the parties interested before the court and obtaining an order to enforce the decree.

Following the analogies of the law, it would seem that if an order of sale has not been executed within seven years from the date of its entry, the parties may be brought before the court at any time within twenty years, and in a proper case the order may be revived and enforced; but we do not think that the order ought to be enforced, in a case like this, more than twenty years after the original order was entered. The only excuse for the long delay which was alleged or proved was, that the lands were worth nothing in the market until recently, when there has been a great advance in market value. In the case of *People v. Lanham*, 189 Ill. 326, 59 N. E. 610, where a great delay in

beginning the proceeding was excused, the lands were subject to a homestead estate, and could not have been subjected to a sale for the payment of the debts of the estate, and similar conditions existed in other cases where it was held that the delay was satisfactorily explained. There was something in the condition of the title which prevented a sale, and not a mere question of market values, which has not been regarded as good ground for delay: *Graham v. Brock*, 212 Ill. 579, 103 Am. St. Rep. 248, 72 N. E. 825. A steady increase in the market value of farm lands in this state has taken place since the first settlement of the country, and a probability of increased market value in the future would exist in every case. None of the reasons generally applicable to the commencement of proceedings which would excuse delay could have any force in excusing the execution of the order when once made.

The judgment of the appellate court is affirmed.

Estates of Decedents.—As to Laches in Applying for Orders to Sell the real property of a decedent to pay debts, see the note to *Killough v. Hinton*, 26 Am. St. Rep. 22. A delay for more than seven years after the grant of letters of administration before attempting to subject the land of an intestate to the payment of his debts will bar such proceeding, where the only excuse for the delay is that the values of real estate in the city where the land is situated were declining during that time: *Brogan v. Brogan*, 63 Ark. 405, 58 Am. St. Rep. 124.

FISCHER v. BUTZ.

[224 Ill. 379, 79 N. E. 695.]

PARTITION—Power Conferred Upon Executors or Trustees to Make, When Exclusive.—If a testator by his will vests in his executors authority to partition his real property among his heirs and devisees, a court of equity will not take the execution of the trust out of their hands unless they have abused it or have for an unreasonable time refused to exercise it. (pp. 163, 164.)

PARTITION—Dismissal of Bill for Because Power to Partition is Vested in Executors.—A bill filed for the partition of real property of a testator or decedent will be dismissed where his executors are, by the will, vested with authority to make partition, and only four months and a half have elapsed since the death of the testator and but three and a half months since the admission of the will to probate. They should be allowed time to ascertain whether and to what extent the estate is indebted, and to so inform themselves as to intelligently exercise their discretion. (p. 164.)

PARTITION, Exercise of Power of by Executors Though There are Conflicting Claims of Title.—A claim by a woman that she is the widow of the testator by virtue of a common-law marriage does not constitute a sufficient ground for the taking of jurisdiction by a court of equity of a suit to partition his property commenced by one of his heirs, where the executors are, by the will, given power to make partition and have not refused nor unreasonably delayed to exercise their power. (pp. 164, 165.)

PARTITION.—Jurisdiction of the Court to Make Partition of the Property of a Decedent, he having vested his executors with power to partition it, cannot be sustained on the ground that when the suit for partition was commenced, it could not be known whether the personal property would be sufficient to pay his debts and legacies. It will be no hardship to the heirs and devisees if they are compelled to delay partition until the expiration of the time allowed for filing claims in the probate court against the estate. (p. 165.)

Rosenthal, Kurz & Hirschl, for the appellant.

Mason & Wyman and Vincent D. Wyman, for the appellees.

380 FARMER, J. This was a suit for the partition of the real estate owned by Joseph Fischer at the time of his death. The bill alleges that said Joseph Fischer died testate December 2, 1904; that he left no widow surviving him, but left as his children, Mary L. Zuttermeister, Herman H. Fischer, Oscar Fischer and Arthur Fischer, the last two named being minors; that George C. Fischer, a son of the testator, died before the death of his father, leaving no children, but leaving the complainant, Josephine Fischer, his widow. The will of Joseph Fischer, after directing the payment of his debts and a bequest of five hundred dollars to Sophie Butz, gave all the rest, residue and remainder of his estate, real, personal and mixed, to his children in equal parts, share and share alike. The will further provided that if any child died before the death of the testator, leaving no children but leaving a husband or wife, such surviving husband or wife should receive one-third of the share of such deceased child, the other two-thirds to be divided equally among the testator's surviving children. Appellant, as surviving wife of George C. Fischer, deceased, filed a bill for partition, claiming to be the owner of an undivided one-fifteenth of the real estate owned by the testator at the time of his death. The will was executed in March, 1901, and by it the testator appointed his three adult children, Mary L. Zuttermeister, George C. Fischer

and Herman H. ³⁸¹ Fischer, or the survivors of them, executors. After naming them as such executors and directing that they be allowed to qualify without giving bond, the will reads: "And I hereby give and grant to the said executors full power and authority to settle my estate in such manner as to them may seem best; to compromise and compound all claims and demands in favor of or against my estate; to give full discharges and acquittances; to sell, convey, mortgage or partition any part or all of my estate for the purpose of settlement thereof, and to do all acts which they may deem necessary or advisable in the administration of my estate, without any order of court." The bill made Sophie Butz a defendant, and alleged that she falsely claimed and pretended to be the widow of Joseph Fischer, deceased; alleged she was not such widow; that she had never been married to Joseph Fischer, and asked that the court decree that she is not the widow of Joseph Fischer, and has no interest, as widow, in his estate. Sophie Butz answered complainant's bill and filed a cross-bill, by which she claimed to be the widow of Joseph Fischer, deceased, by virtue of a common-law marriage between them. The executors and devisees of the will filed an answer admitting the material allegations of the bill, and averring that by virtue of the authority of the will empowering the executors to make partition of the real estate of the testator without going into court, said executors did, on seventeenth day of May, 1905, by their deed of partition, convey and set off to the complainant, as and for her one-fifteenth share in the real estate of the testator, lot 14 in the bill described, subject to a trust deed in the nature of a mortgage to secure a note for the sum of nine hundred dollars. The answer avers that the said lot, subject to the encumbrance, was of the value of one-fifteenth part of all the real estate described in the bill. The cause was referred to the master to take proof and report his conclusions. After hearing the evidence the master reported that the executors of the will of Joseph Fischer, deceased, acting within the powers vested in them by said will, ³⁸² had partitioned and set off to the complainant, in fee simple, her full share and interest in the real estate of testator, and that she had no title or interest in any of the other real estate she sought to partition and was not entitled to any

relief prayed in her bill. He also found and reported against the claim of Sophie Butz made by her cross-bill, and recommended that both the original and cross-bills be dismissed. A decree was entered in accordance with the recommendations of said report of the master, dismissing both the original and cross-bills. From that decree complainant in the original bill has prosecuted this appeal. No appeal was prosecuted by Sophie Butz, and the correctness of the decree in dismissing her cross-bill is not involved in this record.

The question to be determined is, whether the power conferred by the will upon the executors to partition the land, and the partitioning and setting off to appellant by them of her share of the real estate, precluded her from maintaining a bill for partition.

The will of Joseph Fischer was admitted to probate on the seventh day of January, 1905. Appellant filed her bill for partition April 18, 1905. The decree finds that the executors prepared a deed May 17, 1905, conveying to appellant the premises partitioned and set off to her; that said deed was acknowledged June 1, 1905, recorded June 2, 1905, and mailed to appellant August 21, 1905, and that appellant in due time notified the executors that she refused to accept the deed.

That the will conferred power upon the executors to partition the real estate of the deceased is not disputed. Appellant's contention is, that the power in the executors to make partition is merely authority to do so if they deem it advisable, and this power is subject to be defeated by a bill for partition being filed before the power is exercised. It is also urged that Sophie Butz claimed to be the widow of testator, and that this clouded the title to his real estate, and that this cloud could only be removed by a court of equity, and afforded ³⁸³ additional reasons why appellant's bill was proper and should have been sustained.

We are of opinion it was the intention of the testator that the power to partition his lands should be lodged in his executors at least for a reasonable time after his death. He is presumed to have known that, in the absence of restrictions in his will to the contrary, his devisees, or any of them, would have had the right to invoke the aid of a court of chancery for partition, and whether he made the

duty to partition mandatory upon his executors or not, the fact that he gave them the power to do so, we think, shows his intention to have been that they should have had at least a reasonable time in which to exercise the power. It was said in *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363: "The bill in this case was filed within a few months of the death of the testator. The estate is a very large one. The trustees need time for consideration, and it appears to me that before the bill was filed sufficient time was not allowed them to agree as to the execution of the trust. It is to be expected that trustees, especially where the estate is large, will have temporary disagreements as to the proper methods of executing the trust. Reasonable time must be allowed them to ascertain and consider the elements that should influence and control their judgment."

The power to partition was a special trust and confidence reposed in his executors by the testator, and a court of equity will not take the execution of that trust out of their hands unless they have abused it or refused for an unreasonable time to execute it themselves. "A court of equity will examine into the conduct of a trustee in the execution of his discretionary powers, and will assume control over the trustee's conduct, and, if need be, will take upon itself the execution of the trust. But the court will exercise this prerogative with great caution, and will not displace the trustee from exercising his functions unless, upon a consideration of the reasons and grounds upon which he has acted,³⁸⁴ it appears that he has abused his trust and that his acts in the premises have not been within the limits of a sound and honest execution of the trust": *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363. Of course, a court of equity would take upon itself the execution of the trust if those charged with it by the will were fraudulently or unfairly dealing with the property to the detriment of the beneficial owners: *Dickson v. New York Biscuit Co.*, 211 Ill. 468, 71 N. E. 1058; *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363; *Perry on Trusts*, secs. 510, 511. The bill in this case was filed four and one-half months after the death of the testator, and three and one-half months after the will was admitted to probate. No demand or request was made upon the executors for partition before it was filed. Indeed, the exercise of some judgment and rea-

sonable discretion upon the part of the executors would forbid a partition and distribution of the real estate at so early a date after letters testamentary were issued, for it could not be known then certainly what the indebtedness of the estate was. It surely cannot be that whether the executors should be permitted to exercise the power and discharge the trust reposed in them by the testator would depend upon whether they could make the partition before one of the devisees could get a bill on file for that purpose. It is not pretended there was any fraud or unfairness in setting off to appellant her share of the land, or that what was set off to her was worth less than the value of her interest in the premises. The decree recites that appellant offered no evidence on this question, and finds, from the evidence offered by the executors, that the partition was a fair and honest one and that the land set off to her was her full share of the real estate.

We do not think the pretense of Sophie Butz that she was the widow of Joseph Fischer by virtue of a common-law marriage with him constituted sufficient grounds for taking from the executors the powers and duties conferred upon them by the will. The mere fear that some designing adventuress might seek to establish some fraudulent claim ²⁸⁵ upon property would not authorize a court of equity, on appellant's motion, to assume the execution of the trust. And this is especially true under the facts in this case as found by the decree. The decree finds that at the time of the probate of the will, also at the time of the death of Joseph Fischer, and at a time about six months prior thereto, there were rumors in the neighborhood where he lived that he and Sophie Butz were married, and said claim by Sophie Butz became known to all the children of Joseph Fischer at the time his will was admitted to probate. The decree further finds that at all times since the death of Joseph Fischer his executors and heir at law were in possession of abundant evidence establishing the fact that said Sophie Butz was not married to and was not the widow of Joseph Fischer. Up to the time the bill in this case was filed by appellant, Sophie Butz had made no move to establish her claim. She made no resistance to the proceeding when the will was admitted to probate, proof of heirship made and letters testamentary granted.

It is also urged by appellant that partition in equity was necessary because it could not be known when the bill was filed whether the personal property would be sufficient to pay the debts and legacies, and if the partition was made by the executors, it could not be known whether the lands were free from liability on account of indebtedness of the estate. It does not appear that any emergency existed for partition that required a court of equity to so far take charge of the administration of the estate as to determine, in advance of the time allowed by law for determination in the probate court, whether the personal estate was sufficient to pay the indebtedness, so that the partition might be made. It would not be the imposition of a hardship on a tenant in common if partition were delayed until the expiration of the time allowed by law for filing claims in the probate court against an estate. It is only then that it can be ascertained certainly what the liabilities of the estate are.

³⁸⁶ We are of opinion the filing of the bill by appellant did not defeat the power conferred upon the executors by the will, and that the superior court properly dismissed the bill. Said decree is therefore affirmed.

Partition of the Estates of Decedents in connection with the distribution thereof is considered in the note to *Buckley v. Superior Court*, 41 Am. St. Rep. 140.

ALDRICH v. PEOPLE.

[224 Ill. 622, 79 N. E. 964.]

LARCENY—Goods Obtained by Trick.—If the owner of goods alleged to have been stolen parts with both the title and the possession to the thief, not expecting the goods to be returned to the owner or to be disposed of according to his directions, neither the taking nor the conversion amounts to larceny, though the owner was induced to part with the title and possession through the fraud or misrepresentation of the thief. (p. 168.)

LARCENY.—If the Owner of Goods Parts with the Possession, but Retains the Title, expecting and intending that the goods shall be returned to him or disposed of in some particular manner agreed upon, the subsequent felonious conversion of the property by the

alleged thief relates back and makes the taking and conversion larceny. (p. 168.)

LARCENY.—Every Larceny Includes a Trespass. (p. 168.)

LARCENY of Property in Possession of Servant.—The fact that a servant in whose possession property is consents to its taking will not prevent the act being larceny, he having no authority to consent, and the wrongdoer being aware of that fact. (p. 169.)

LARCENY.—The Asportation Necessary to Larceny May be Effected by an innocent human agency as well as by mechanical agency or by the offender's own hands. (p. 170.)

LARCENY Effected by Shifting the Checks on Baggage.—If a larceny is effected by shifting the checks on baggage which is in the hands of a transportation company, and thereby an agent of such company is allowed to further the criminal purpose by delivering the baggage to a person not entitled thereto, who receives and converts it to his own use, having in his own mind at all times the felonious intent to steal the property, he is guilty of larceny. (p. 171.)

TRIAL—Construction of Instructions.—A charge to the jury that if they find that the accused or any other witness has willfully and corruptly testified falsely to any fact material to the issue, they have the right to entirely disregard his testimony, except in so far as it is corroborated by other evidence of facts and circumstances in evidence, is not susceptible of the construction that the jury may disregard the testimony of the defendant if some other witness has testified falsely. (pp. 171, 172.)

Prosecution and conviction for larceny. In July, 1905, Miss Barr checked her trunk at Grand Haven, Michigan, for Chicago, and took passage on a steamship of the Goodrich Transportation Company. At Chicago, she gave the check for her trunk to a transportation company to be transferred to the Burlington depot and checked to Oakland, California. On arriving at Oakland and giving her check to a transfer company, it brought a trunk to her which she at once discovered was not hers, although it had a check attached corresponding to the one she had received in Chicago. The evidence tended to show that after Miss Barr passed through Chicago, a man appeared at the baggage-room of the Goodrich Transportation Company with two trunks, bought a ticket, and checked them to Milwaukee. It was subsequently discovered that these trunks were very light and apparently empty and had had their locks broken. The defendant presented checks and demanded the trunks. One of these was afterward identified as Miss Barr's, and there was evidence tending to show that the defendant had secured possession of her trunk by having a duplicate of the check that was originally attached to the trunk delivered her in California.

Cantwell & Erbstein and Charles P. R. Macauley, for the plaintiff in error.

W. H. Stead, attorney general, John J. Healey, state's attorney, John R. Newcomer and Howard O. Sprogle, for the people.

625 VICKERS, J. 1. The court instructed the jury, as a matter of law, that if one obtains property from the owner or custodian thereof by some sort of a trick or device, for the purpose of stealing and converting the same to his own use, he will be guilty of larceny. Error is assigned upon the giving of this instruction. The contention of plaintiff in error is, that if the property was obtained with the consent of the transportation company it would not amount to larceny, even though such consent was obtained by means of a trick or device and with the intention of stealing the same.

It is an established rule of the common law relating to the offense of larceny that if the owner of the goods alleged to have been stolen parts with both the possession and the **626** title of the goods to the alleged thief, not expecting the goods to be returned to the owner or to be disposed of in accordance with his directions, then neither the taking nor the conversion amounts to larceny; and this is true even where the owner is induced to part with the title and possession through the fraud and misrepresentation of the alleged thief. If, however, the owner merely parts with the possession and retains the title, expecting and intending that the goods shall be returned to him or disposed of in some particular manner agreed upon, in such case the subsequent felonious conversion of the property by the alleged thief will relate back and make the taking and conversion a larceny: *Welsh v. People*, 17 Ill. 339; *Stinson v. People*, 43 Ill. 397; *Murphy v. People*, 14 Ill. 528; *Johnson v. People*, 113 Ill. 99; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46; *Doss v. People*, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; *Steward v. People*, 173 Ill. 464, 64 Am. St. Rep. 133, 50 N. E. 1056; *Bergman v. People*, 177 Ill. 244, 52 N. E. 363.

The doctrine illustrated and applied in the above cases is based on the rule of the common law that every larceny includes a trespass, and since the alleged thief could not commit a trespass on property in his possession and re-

specting which the owner had parted with the possession and title, such property could not be the subject of larceny by the fraudulent possessor. The above rule does not, in our opinion, have any application to the case at bar, for the reason that the Goodrich Transportation Company held the trunk and its contents merely as bailee of the rightful owner, of which plaintiff in error must, upon the theory of the prosecution, be presumed to have had notice, and therefore such transportation company had no authority to consent to the title passing, with the possession, to plaintiff in error. But even if it could be held that the corporation could have given such consent by its proper officers, it certainly cannot be said that the mere act of its servants in turning over the trunk to plaintiff in error upon the mistaken supposition that he was entitled to the possession thereof, would amount to such a consent as is necessary to bring the case within the rule contended ⁶²⁷ for by plaintiff in error. In McClain on Criminal Law (volume 1, section 558) it is said: "The fact that the servant in whose possession the property is consents to its taking will not prevent the act being larceny, he having no authority to consent, and the wrongdoer being aware of that fact": State v. McCarty, 17 Minn. 76; People v. Griswold, 64 Mich. 722, 31 N. W. 809; State v. Edwards, 36 Mo. 394. It seems clear, on principle, that if property is obtained from an infant or an insane person, who is legally disqualified from giving consent, with the felonious intent to steal the same, such consent could not be availed of as a defense to a charge of larceny. The same principle ought to apply to bailees, whose interest in the property is known to the alleged thief.

In our opinion the case at bar is not controlled by the principle contended for by the plaintiff in error. The case comes within the rule laid down in Commonwealth v. Barry, 125 Mass. 390. This case, in all of its essential facts, is like the case at bar. The charge was for the larceny of a trunk, and the offense was committed by the shifting of checks, as is alleged in the case at bar. In disposing of the case the court said: "It does not appear that the question whether there was an asportation at or before the changing of the checks was raised at the trial. An asportation at that precise time was unimportant. The real question was whether the defendant then, feloniously and with an intent to steal,

set in motion an innocent agency by which the trunk and its contents were to be removed from the possession of the true owner and into the defendant's possession, and by means of such agency effected the purpose. . . . There is no occasion that the carrying away be by the hand of the party accused, for if he procured an innocent agent to take the property, by means of which he became possessed of it, he will himself be the principal offender: 3 Chitty on Criminal Law, 925. It is held to be larceny if a person intending to steal my horse take out a replevin and thereby have the horse delivered to him by the sheriff, or if one intending to rifle ⁶²⁸ my goods get possession from the sheriff by virtue of a judgment obtained without any the least color or title, upon false affidavits, etc., in which cases the making use of legal process is so far from extenuating that it highly aggravates the offense by the abuse put on the law in making it serve the purposes of oppression and injustice": 1 Hawkin's Pleas of the Crown, 333, par. 12; 1 Hale's Pleas of the Crown, 507.

It will thus be seen that an asportation may be effected by means of innocent human agency as well as mechanical agency, or by the offender's own hands. One may effect an asportation of personal property so as to be guilty of larceny by attaching a gas-pipe to the pipes of the company and thus draw the gas into his house and consuming it without its passing through the meter: Clark & Marshall on Law of Crimes, 446, and cases cited in note; Woods v. People, 222 Ill. 293, 113 Am. St. Rep. 415, 78 N. E. 607. From these cases the law appears to be well settled that where, with the intent to steal, the wrongdoer employs or sets in motion any agency, either animate or inanimate, with the design of effecting a transfer of the possession of the goods of another to him in order that he may feloniously convert and steal them, the larceny will be complete, if, in pursuance of such agency, the goods come into the hands of the thief and he feloniously converts them to his own use, and in such case a conviction may be had upon a common-law indictment charging a felonious taking and carrying away of such goods. If in the case at bar the accused shifted the checks on the trunks, by means of which the servants of the transportation company were innocently led to further the criminal purpose by delivering the trunk

in question to the accused, who received and converted the same to his own use, and if there was in the mind of the plaintiff in error a felonious intent to steal this property pervading the entire scheme and attending every step of it, then he is guilty of larceny, and the instruction under consideration, as applied to such a state of facts, is a correct statement of the law, and there was no error in giving it to the jury.

⁶²⁰ 2. Instruction No. 2 given on behalf of the people contains the same principle of law as No. 1, and the objections thereto are disposed of by the foregoing discussion of the first instruction.

Instruction No. 3 relates to the count in the indictment charging plaintiff in error with receiving stolen property. Since the jury acquitted plaintiff in error of this charge we need not consider the exception to this instruction.

3. Instruction No. 7 given for the people is also excepted to. That instruction is as follows: "The court instructs the jury, as a matter of law, that in this state the accused is permitted to testify in his own behalf; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness-stand; and the jury are also to take into consideration the fact, if such is the fact, that he has been contradicted by other credible witnesses. And the court further instructs the jury that if, after considering all the evidence in this case, they find that the accused or any other witness has willfully and corruptly testified falsely to any fact material to the issue in this case, they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other evidence or facts and circumstances in evidence."

The objection to this instruction, as stated by plaintiff in error in his brief is, that it is erroneous in informing the jury that if they found that any witness had committed perjury they had a right to disregard the testimony of the defendant. This argument is based on the assumption that

the pronoun "his," in the third line from the bottom of the instruction, refers to the defendants only, and not to the ⁶³⁰ defendant "or any other witness." This construction is as illogical as it is ungrammatical. The language of the instruction does not mean that the jury should disregard the defendant's testimony if some other witness had willfully and corruptly testified falsely to some material fact in issue, and we cannot believe that anyone with intelligence enough to serve on a jury would understand the instruction as announcing a rule so unreasonable and absurd.

Other objections to the instructions given, as well as the exceptions to the refusal of the court to give some and to the modification of other of the instructions of plaintiff in error, have all received our careful consideration, and we have reached the conclusion that no error exists for which the judgment below should be reversed. Accordingly, the judgment below should be and is affirmed.

For Authorities bearing upon the principal case, see the note to People v. Miller, 88 Am. St. Rep. 559, on larceny.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

CLARK v. TORONTO BANK.

[72 Kan. 1, 82 Pac. 582.]

BANKS AND BANKING—Unaccepted Checks as Assignment of Deposit.—An unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment, in law or equity, of any part of the drawer's deposit in bank. (p. 175.)

S. C. Holmes, for the plaintiff in error.

W. S. Marlin, for the defendants in error.

² MASON, J. B. B. Clark, a resident of Iowa, sold some cattle in Woodson county, Kansas, through an agent, who accepted in payment a check drawn on the Toronto Bank, in that county. The agent presented the check at the bank, and upon his request was given in payment a draft payable to the order of his principal, drawn by the Toronto Bank upon a Kansas City bank against a fund then on deposit there to its credit. Shortly afterward the Toronto Bank was closed by the bank commissioner, and in due course of time a receiver was appointed. The draft was presented for payment to the Kansas City bank, which, having notice of the failure of the issuing bank, refused for that reason to pay it. Clark, the holder of the draft, brought an action against the receiver, asserting the right to recover from him the full amount of the draft irrespective of the amount the failed bank might be able to pay its general creditors. He was denied relief and now prosecutes error.

In the petition an attempt was made to give the transaction described the color of a special deposit, or a contract for the transferring of a fund in specie from Toronto to the plaintiff's home in Iowa. As clearly appears from the statement made, however, the facts will not bear that construction. The transaction was the ordinary one of the purchase of a draft for convenience in the remitting of money, and the giving to it of a different name cannot alter its essential character. In a stipulation regarding the facts upon which, together with the plaintiff's evidence, the case was submitted, it was stated that the plaintiff was at no time a creditor of the failed bank, but this statement cannot overcome the effect of the specific facts admitted and shown, if inconsistent with them. It must be interpreted as meaning either that the ³ plaintiff was not a creditor of the bank, except so far as that relation was created by the facts already recited in detail, or as a mere conclusion of law, to be disregarded by the court if found to be incorrect.

An effort is also made to build up a right to have the money paid by plaintiff to the Toronto Bank treated as a trust fund, upon the theory that it was a deposit unlawfully received by the officers of the bank while it was insolvent and while they knew of its insolvency. If the facts in this case are otherwise sufficient to bring it within the principle invoked, they fall short in this: It is shown that the bank was insolvent when the draft was purchased, but not that the officers were cognizant of the fact; and there is an entire failure of any showing that the money paid for the draft ever reached the hands of the receiver or that the assets in his hands were increased in any way by the transaction.

The plaintiff's action must, therefore, fail unless it can be said that the issuance of the draft operated to transfer to him the equitable title to so much of the money of the Toronto Bank then on deposit in the Kansas City bank as it called for, in which case the receiver, who succeeded only to the rights of the failed bank and was entitled only to its assets, could have no valid claim upon that portion of the deposit. This theory has received the support of a number of courts and is the settled law in several of the states. It is adopted by Mr. Daniel in his work on Nego-

negotiable Instruments (volume 2, fifth edition, section 1643). Nevertheless, the great weight of authority is to the effect that an unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment, in law or equity, of any part of the drawer's deposit: 5 Cyc. 536; 2 Am. & Eng. Ency. of Law, 1064; 4 Century Digest, cc. 1247-1250. This rule has frequently been enforced in controversies between the holder of a draft and the assignee or receiver of its insolvent drawer: Fourth Street Bank v. Yardley, 165 ⁴ U. S. 634, 17 Sup. Ct. Rep. 439, 41 L. ed. 855; Covert v. Rhodes, 48 Ohio St. 66, 27 N. E. 94, and cases cited; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Akin v. Jones, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669, 25 L. R. A. 523; Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805; Guthrie Nat. Bank v. Gill, 6 Okla. 560, 54 Pac. 434; Reviere v. Chambliss, 120 Ga. 714, 48 S. E. 122. It has the sanction of so great a preponderance of the authorities that we have no hesitation in accepting it.

A uniformity of decision in different jurisdictions upon matters of commercial usage is especially to be desired, and the question here presented, being of that character, affords a strong argument in favor of a solution that shall be in harmony with the generally prevailing doctrine. It may be added that since this action arose the rule referred to has been incorporated in the Kansas statute, being found in section 196 of the negotiable instruments act (Laws 1905, c. 310). The general adoption of substantially the same act, in pursuance of an organized effort to secure uniformity upon the subject, may finally make the rule of universal application.

No exceptional circumstances being shown in this case, it falls within the operation of the principle stated, and the plaintiff cannot recover. The judgment is affirmed.

All the justices concurring.

Banking—Checks as Assignments.—The Authorities are at variance on the question whether a check operates as an assignment of the money for which it is drawn: See Pullen v. Placer County Bank, 138 Cal. 169, 94 Am. St. Rep. 19, and cases cited in the cross-reference note thereto; Turner v. Hot Springs Nat. Bank, 18 S. Dak. 498, 112 Am. St. Rep. 804; Loan and Sav. Bank v. Farmers' etc. Bank, 74 S. C. 210, 114 Am. St. Rep. 991.

INTERSTATE NATIONAL BANK v. RINGO.

[72 Kan. 116, 83 Pac. 119.]

PAYMENT by Check.—The mere delivery and acceptance of a check is not payment nor evidence of payment. (p. 181.)

PAYMENT.—Credits Made Upon Books of Account can have no greater effect as evidence of payment than receipts given acknowledging payment, and the latter, when exchanged for checks, do not show that absolute payment was intended. (p. 182.)

BANKS AND BANKING—Payment by Check.—If a bank holding a note for collection delivers it to an indorser on the day of maturity in exchange for such indorser's check on another bank, and after inquiring by telephone of the drawee bank about the check, and being informed, through mistake, that it would be paid, enters the amount to the credit of the owner of the note, and on the next day payment of the check, which was at no time good, is refused for want of funds, and the collecting bank delivers it to the drawer, and immediately recovers possession of the note, these transactions do not constitute payment of the note. (p. 182.)

BANKS AND BANKING—Note Held for Collection—Acceptance of Worthless Check—Liability of Bank.—If a bank, holding a note for collection, surrenders it to the maker in exchange for his worthless check upon another bank, and upon the dishonor of such check regains possession of the note as a subsisting obligation against all persons in interest, with no actual prejudice to the owner of the note from the transaction, which takes place after banking hours of one day and before their opening on the next day, no liability is created against the collecting bank in favor of the owner of the note. (pp. 184, 185.)

BANKS AND BANKING—Collections—Provisional Credit.—If a note or draft is sent by one individual or bank to another bank to collect, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of creditor and debtor, and having received the note or draft for collection, the collecting bank does not owe the amount thereof to the sender until collected, and though it may credit him in its books therefor, such credit may be treated as provisional, and if the paper is afterward dishonored, it may cancel the credit. (p. 186.)

BANKS AND BANKING—Collections—Erroneous Credit to Owner of Note—Liability of Bank.—If a bank holding a note for collection surrenders it to the maker in exchange for his worthless check on another bank, and upon the dishonor of such check immediately regains possession of the note as a subsisting obligation against all interested parties, no liability arises against the collecting bank in favor of the owner of the note from the facts that upon being orally promised payment by mistake on the part of the bank on which such check is drawn, it gives such owner credit for the amount, mails him a statement to that effect, adding that the credit is subject to collection, and gives him notice of the dishonor of the check early in the morning of the next day after the credit is extended. (p. 187.)

C. F. and S. D. Hutchings, McFadden & Morris and W. R. Smith, for the plaintiff in error.

S. D. Bishop, A. C. Mitchell, I. N. Watson and E. C. Meservey, for the defendants in error.

¹¹⁷ MASON, J. Ringo & Askew, residing in Oklahoma, gave their note for \$10,209.63 to Ladd, Penny & Swazey, commission merchants, of Kansas City, due without grace June 14, 1900, secured by a mortgage on cattle, which was duly filed for record. The payees sold the note to the Watkins National Bank of Lawrence, which sent it for collection to the Interstate National Bank at Kansas City a few days before its maturity. To meet this note the makers, on June 5, 1900, executed a new note, and a mortgage on the same cattle securing it, and sent it to Ladd, Penny & Swazey with directions to sell it and use the proceeds to pay the first note. Ladd, Penny & Swazey indorsed the note to the Union Brokerage Company to find a buyer for it. The Union Brokerage Company sold the note to the Boatmen's Bank of St. Louis, which paid for it by giving the brokerage company credit for the amount. The Union Brokerage Company paid Ladd, Penny & Swazey for the note by giving them its check on the Merchants' Bank of Kansas City. Ladd, Penny & Swazey had at the time issued checks on the Merchants' Bank which exceeded the amount of their deposit by \$11,393.92. To provide for the payment of these checks, upon receiving notice from the bank that they had been presented and would not be paid unless such provision were made, they, on June 13th, deposited the check given them by the Union Brokerage Company for the Ringo & Askew note, and the checks were paid by reason of this deposit. The deposit was made in the Interstate National Bank to the credit of the Merchants' Bank, in ¹¹⁸ accordance with an existing arrangement between the banks and Ladd, Penny & Swazey.

In the afternoon of June 14th the collector of the Interstate National Bank, as was his custom, took the note which had been sent to it for collection by the Watkins bank, carried it to the office of Ladd, Penny & Swazey, and left it there, going on with other business. Later in the afternoon he returned to the office and took from a basket,

where it had been left for him, a check drawn by Ladd, Penny & Swazey on the Merchants' Bank, payable to the Interstate bank, for the amount of the note. There was no conversation on the occasion of either visit. The collector took the check to the Interstate bank, letting the note and mortgage remain with Ladd, Penny & Swazey.

Previous to this time (and the arrangement still subsisted) the Merchants' Bank had authorized the Interstate bank to pay and charge to its account any checks drawn by Ladd, Penny & Swazey upon the Merchants' Bank that were stamped "Interstate National Bank" under or across the words "Merchants' Bank." Where a check drawn by this firm upon the Merchants' Bank but not bearing the stamp "Interstate National Bank" was presented at the latter bank, it was the custom to call up the Merchants' Bank by telephone, ask instructions, and be governed by the reply.

The check under consideration bore no such stamp. When it was delivered by the collector to the teller of the Interstate bank a little after 3 o'clock he called up the Merchants' Bank and inquired if it was good. The officer of the Merchants' Bank who responded to the inquiry understood that another check was referred to—one for a smaller amount given by Ladd, Penny & Swazey to a different payee—and answered that it was good and that his bank would pay it. Relying upon this assurance the Interstate bank credited ¹¹⁹ the Watkins bank with the amount of the check and mailed to it a postal card reading as follows:

"J. D. Robertson, Prest.

"Lee Clark, V.-prest.

Wm. C. Henrici, Cash.

"THE INTERSTATE NATIONAL BANK.

"Stock-yards Station, Kansas City, Kan.

"June 14, 1900.

"Yours of ——— received with enclosures as stated. Due diligence will be observed in the selection of banks or agents for the collection of all papers out of the city, but this bank will not be responsible for the failure or negligence of such bankers or agents. All items credited subject to payment.

"Credited:

Entered for collection:

"No. 16,513. \$10,209.63.

W. N. Bank, June 15, 1900."

It also mailed the check to the Merchants' Bank for collection and credit. The Merchants' Bank, about two hours after the conversation related, discovered its mistake and attempted to reach the Interstate bank by telephone, but was unable to do so. At half-past 8 the next morning, however, it did so, explained the misunderstanding of the day before, said that Ladd, Penny & Swazey had no funds to meet the check, and asked in substance to be relieved of any liability resulting from its former statement. The Interstate bank answered in effect that it had surrendered the note for which the check was given and which it had held for collection, and that it could not release the Merchants' Bank, but that it would do what it could to assist it and for that purpose would talk with the Watkins bank. It accordingly at once called up that bank by telephone, stated that the notice of credit of the day before had been sent by mistake, that a check which had been given for the note had not been paid, and asked instructions. Later in the day the Watkins bank directed the protest of the note, without having been informed, however, of the details of the transactions of the previous day or of the connection of the Merchants' Bank with the matter.

The Merchants' Bank, on the morning of the 15th, refused payment of the check and returned it to the ¹²⁰ Interstate bank, which on the same morning, between 9 and 10 o'clock, sent it to Ladd, Penny & Swazey and exchanged it for the Ringo & Askew note and mortgage. The note was then formally protested. The Merchants' Bank, during all of this time, carried a deposit of some \$25,000 with the Interstate bank. At some time—the exact date does not seem to be shown and is not important—the Interstate bank charged the amount of the check against this deposit. On June 16th the Watkins bank, having learned all the circumstances of the case, notified the Interstate bank that it refused to permit the credit given it to be set aside, and would insist upon the payment of the amount. On June 18th the Interstate bank replied stating that while it had originally credited the Watkins bank with the amount, and charged it to the Merchants' Bank, it had now charged it to the Watkins bank and placed it in the form of a cashier's check, and was so holding it pending a settlement of the matter. About a month later the Interstate bank paid the

money to the Merchants' Bank, upon the execution of a bond indemnifying it against the claim of the Watkins bank.

After 3 o'clock in the afternoon on June 14th Ladd, Penny & Swazey took notes of the face value of \$28,000 to the Merchants' Bank and asked it to accept them as collateral security for all overdrafts, notes and bills of exchange, and to agree to pay all their checks that had been written that day. This the bank refused to do, the officers conducting the negotiations saying that they would have to take the matter up with the other directors. The collateral offered was left with the bank and was never returned to Ladd, Penny & Swazey.

On the morning of June 15th the Union Brokerage Company saw the note and mortgage in the office of Ladd, Penny & Swazey, in their custody and under their control.

Ringo & Askew brought a suit against all persons interested asking that their first note be canceled, upon the theory that it had been paid. Issues were framed ¹²¹ between the various parties, findings were made embodying substantially the facts already stated, from which the court concluded that the note had been paid, and a judgment was rendered decreeing the cancellation of the note, ordering the Interstate bank to pay its amount to the Watkins bank, declaring that the note held by the Boatmen's Bank was a first lien upon the mortgaged cattle, and holding that the question of the liability of the Merchants' Bank to the Interstate bank was not raised by the pleadings. The Interstate bank prosecutes error.

In support of the judgment rendered it is argued that, inasmuch as the check given by the Union Brokerage Company to Ladd, Penny & Swazey really belonged to Ringo & Askew, it could not, under the circumstances of this case, be diverted from its true ownership, but after its deposit in the Merchants' Bank constituted a trust fund for the purpose for which it was intended, namely, the payment of the first Ringo & Askew note. The cases of Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906, 49 Neb. 125, 68 N. W. 358, and Davis v. Panhandle Nat. Bank (Tex. Civ. App.), 29 S. W. 926, are the strongest ones cited to sustain this contention. Whether the doctrine they announce would apply to the facts here presented need not be de-

terminated, for this court has already refused to follow them: *Kimmel v. Bean*, 68 Kan. 598, 104 Am. St. Rep. 415, 75 Pac. 1118, 64 L. R. A. 785. Upon the authority of that case and *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 218, it must be held that the proceeds of this check became the absolute property of the Merchants' Bank, and the situation ¹²³ presented is no different from what it would have been if Ladd, Penny & Swazey had spent the money which belonged to Ringo & Askew for any other purpose of their own, instead of using it, as they happened to do, to provide for the payment of checks issued by them upon the Merchants' Bank. As was said in the syllabus of *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 818: "A bank cannot be held to account to the owner of a fund where such fund has been deposited by an agent in his own name and paid out upon his check without knowledge by the bank of any want of power on the part of the agent."

The two principal questions involved are: 1. Do the circumstances narrated show a payment of the Ringo & Askew note so as to discharge the makers from liability upon it? 2. Was the conduct of the Interstate National Bank such as to establish a liability against it in favor of the Watkins National Bank?

The inquiry whether the note was paid may perhaps be simplified by a consideration of the effect of the successive steps in the transaction. The mere delivery and acceptance of the check of course did not constitute a payment and were no evidence of a payment: 22 Am. & Eng. Ency. of Law, 569, par. 13. The surrender of the note (if it is to be considered as having been surrendered) did not affect the matter one way or the other: 22 Am. & Eng. Ency. of Law, 572, d. If the Interstate bank had been the owner of the note, and upon receiving the check had made entries upon its books as though a payment had been made, this likewise would have been immaterial, for such entries would be interpreted in the event of the nonpayment of the check as evidencing conditional payment only: *Cheltenham Stone etc. Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. 923; *Turner v. Bank of Fox Lake*, 3 Keyes (N. Y.), 425. Credits made upon books of account can have no greater effect in this connection than receipts given acknowledging payment, and these, where exchanged ¹²³ for checks, do not show that

absolute payment was intended: 22 Am. & Eng. Ency. of Law, 572, e. The fact that the Interstate bank held the note for collection and credited the proceeds to the Watkins bank does not call for a different rule in interpreting the entry of such credit. Whatever effect it may have had upon the relations of the Interstate bank and the Watkins bank, it was as to the makers of the note merely evidence of a conditional payment.

If, then, the note was ever paid so as to protect Ringo & Askew, this condition must have resulted from the transactions between the Interstate bank and the Merchants' Bank. In this connection it is important to notice that in the telephone conversation between these banks on June 14th the Merchants' Bank did not authorize the Interstate bank to pay the check out of the funds of the Merchants' Bank then on deposit in the Interstate bank. If that authority had been given and acted upon the situation would have been the same as though the check had been presented at the counter of the Merchants' Bank and there accepted for the credit of the holder. In such a case, according to the prevailing doctrine, the check would ordinarily have been deemed paid, whatever might have been the condition of the account of the drawer, upon the principle that in such circumstances the bank is bound to know of the state of its depositor's account, and cannot be relieved from the effect of any mistake it may make in that regard, and that the entry of the credit closes the transaction: 2 Morse on Banks and Banking, 4th ed., sec. 569; 2 Daniel on Negotiable Instruments, 5th ed., secs. 1621, 1622; 5 Am. & Eng. Ency. of Law, 1058. And if the check had been paid, of course this would have operated to change the conditional payment of the note into an absolute payment. But what the Merchants' Bank in fact did was merely to say that the check was good and to promise to pay it. This was no more than an oral acceptance or certification of the check, and was not binding by ¹²⁴ reason of section 547 of the General Statutes of 1901, which reads: "No person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent."

A bank check is held to be a bill of exchange within the meaning of this section: Eakin v. Bank, 67 Kan. 338, 72

Pac. 874. It does not appear that the Interstate bank charged the check to the account of the Merchants' Bank on the 14th—the day it was given—for on that day it was mailed to the latter bank for collection and credit. Such an entry upon the books of the Interstate bank, however, would have been unimportant, for it would have been made without authority. The matter is not affected by the consideration that the Interstate bank afterward attempted to hold the Merchants' Bank liable for the payment of the check, and accordingly made an entry upon its books showing a deduction of the amount from the deposit account of the Merchants' Bank. The assertion by the Interstate bank of a claim against the Merchants' Bank which could not be maintained did not operate by estoppel or otherwise to prevent its standing upon any legal right it might have against Ringo & Askew. It follows that the trial court erred in concluding that the facts found showed that the Ringo & Askew note had actually been paid. As the note until paid was secured by a lien upon the cattle, it was likewise error to hold that the mortgage accompanying the note held by the Boatmen's Bank was a first lien.

To sustain the trial court in holding the Interstate bank liable to the Watkins bank the defendants in error invoke the doctrine that a collecting agent who surrenders the note of his principal in exchange for the check of the maker thereby assumes the risk of its payment. The plaintiff in error denies the doctrine, and contends that the collecting agent is protected from liability in pursuing such course by the fact that ¹²⁵ it is in accordance with a custom of bankers and business men of which the courts must take notice. Of this contention it is said in Daniel on Negotiable Instruments (volume 2, fifth edition, section 1625): "While it may be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice, on the part of the principal, falls far short of a usage which would permit the agent to do likewise": See, also, 5 Cyc. 505, 506; 3 Am. & Eng. Ency. of Law, 804.

Assuming, but not deciding, that ordinarily where a bank holding a note for collection in surrendering it to the maker in exchange for his check upon another bank thereby makes

itself liable to the owner of the note for the amount, would not this case be taken out of the rule by the fact that the Interstate bank regained possession of the note under the circumstances already stated? In Daniel on Negotiable Instruments (volume 2, fifth edition, section 1625), it is said: "In the United States it is quite certain that a banker or other agent, holding a bill or note for collection, would act at his peril in delivering it up on receipt of a check for the amount; and that if the debtor did not pay the amount in money, and the drawer or indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent. If, indeed, on the same day that the bill or note was due the agent received a check for the amount and delivered up the bill or note, but on presentment of the check at the bank, and refusal of payment that very day, it had been returned, the bill or note reclaimed and protested, and the drawer or indorsers duly notified, then no right would be forfeited, but the liability of all preserved. But if the agent neglected to present the check until the next day, it would then be too late to preserve recourse against the drawer, if a foreign bill, by making protest; and if in the meantime the bank had failed, the loss would fall upon the agent."

This language makes plain the theory upon which ¹²⁶ the rule referred to is based, which is that the collecting agent who assumes without authority to pursue a course that results in releasing a part of the security of the note, thus rendering it less valuable than it was before, is justly held to become at once liable to the owner for the full amount, perhaps irrespective of any question of actual or probable final loss. There is at least plausible ground for the argument that until the note is paid its owner is entitled to its possession and to all the incidental rights attached to it, and, therefore, an agent who fails to return either the very thing intrusted to him, or its equivalent in money, the only thing he is authorized to accept for it, should not be permitted to haggle about the extent of the resulting injury, but should be compelled to respond at once to his principal for the amount of the note and to look for his own reimbursement to whatever rights he has succeeded in retaining against the maker. But when the note is recovered without its vitality or security having been in any

way impaired, no reason is apparent why the agent should be liable at all, unless to the extent of any actual loss that might have been occasioned by his act. Therefore, as suggested by Mr. Daniel, a recovery of the note by the collecting agent upon the very day of its surrender to the maker retrieves any wrong thereby done to the owner. But manifestly the only importance of the two acts being done on the same calendar day arises from the necessity under ordinary circumstances of the note being protested on the day of its presentation in order to hold the indorsers.

In the present case there was no indorsement upon the note except that of Ladd, Penny & Swazey, who were hardly in a position to assert a right to notice of its dishonor. Moreover, the note bore upon its face a waiver by the makers and indorsers of both protest and notice of nonpayment. Therefore, the fact that the Interstate bank did not recall the note from Ladd, Penny & Swazey on the day upon which it was delivered ¹²⁷ to them is not controlling here. The leaving of the note at the office of Ladd, Penny & Swazey by the collector was clearly only provisional, as well after he had obtained the check as before. The Interstate bank could not upon any theory be considered as having surrendered the note until it had made inquiry of the Merchants' Bank about the check. This was after banking hours on June 14th. The knowledge that the check was worthless was imparted to it before the beginning of banking hours on the next day, and it at once acted upon the information. So far as the mere lapse of time was concerned, the interval was more significant than if these acts had all been done upon the same day, and no just cause appears for giving them any different effect than would have resulted had the Merchants' Bank succeeded in reaching the Interstate bank by telephone at the time it attempted to do so on June 14th for the purpose of correcting the mistake which it then suspected had occurred.

We do not understand that it is claimed, and it certainly cannot successfully be maintained, that the mere physical exchange of a note held for collection for a check can at once fix a liability upon the collecting agent, irrespective of all considerations of the subsequent conduct of the parties. If after such an exchange the agent, before the maker

of the note left his presence, should become so far doubtful of the sufficiency of the check as to insist upon and obtain a retransfer of the note, this would clearly reinstate the precise situation that existed before any surrender of the note was made. In the present case if, when the Interstate bank first called up the Merchants' Bank, it had been told that the check was worthless and had then reclaimed the note, probably no contention would have been made that it had incurred any liability. This is for all practical purposes just what was done, so far as the mere matter of time was concerned—for the delay was really insignificant. We are, therefore, of the opinion that the recaption of the note was accomplished ¹²⁸ under such circumstances as to relieve the Interstate bank of liability, unless the matter is affected by its entry upon its books of a credit to the Watkins bank, and by its subsequent dealings with that bank and the Merchants' Bank.

We cannot regard this entry of credit upon the books of the Interstate bank as any more determinative of its relations with the Watkins bank than of the question of the payment of the note. In *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994, it was said: "When a note or draft is sent by one individual or bank to another bank for collection and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of creditor and debtor. . . . Having received the note or draft for collection it does not owe the amount thereof to the sender until collected, and though it may credit in its books therefor, such a credit may be treated as provisional if the paper is afterward dishonored, and it may cancel the credit."

"The fact that the depositor's account is credited with the amount of the items taken for collection does not of itself operate to transfer the title to the paper; for, by the custom of bankers, the collection is charged back at once if not paid": 3 Am. & Eng. Ency. of Law, 817.

The fact that the credit was given only after the check had been received and an inquiry made about it does not affect the principle by which the matter is controlled. The bank might well elect to give credit only for such collection items as upon investigation it believed reasonably certain would be paid, and to hold others without credit un-

til actual payment, without, by pursuing such course, binding itself to be answerable whenever its judgment that payment would be made should prove mistaken.

The rule, already referred to, that when a bank accepts a check and credits a depositor with it the transaction is deemed closed and cannot be reopened for the ¹²⁹ correction of a mistake is confined to checks drawn upon the bank which gives the credit, and proceeds upon the principle before stated that the bank is conclusively presumed to know the state of its depositor's accounts. Even with this limitation the rule has not always been approved: 1 Morse on Banks and Banking, sec. 419; 3 Am. & Eng. Ency. of Law, 817, second paragraph of note 1.

In *Steinhart v. National Bank*, 94 Cal. 362, 28 Am. St. Rep. 132, 29 Pac. 717, it was held, although without full discussion, that a bank to which a note had been sent for collection and which at the request of the maker, its customer, charged the amount to him, marked the note canceled, and deposited in the mail addressed to the owner of the note a draft for the amount, might still, upon discovering that the maker was insolvent, reclaim the draft, rescind the entry upon its books, return the note to its principal, and by these means escape liability on its own part, such transactions not having effected a payment of the note: See, also, *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115; *Second Nat. Bank of Baltimore v. Western Nat. Bank of Baltimore*, 51 Md. 128, 34 Am. Rep. 300.

The postal card sent to the Watkins bank is not more effective than the credit upon the books of the Interstate bank. Indeed, it is somewhat significant of the character of the entire transaction that while this card acknowledged the receipt of the note, and the entry of credit for the amount, it also gave express notice that all items were credited subject to payment.

The attitude of the Interstate bank toward the Merchants' Bank—the attempt to insist upon the payment of the check—cannot avail the Watkins bank, which was not entitled to rely upon it and was not misled by it. The positions that the Interstate bank assumed in its communications with the other two banks may not have been entirely consistent with each other, ¹³⁰ but it was not re-

quired to determine at its peril what its obligation might be under the law and at once act accordingly. It was probably in doubt whether it might not be able to hold the Merchants' Bank accountable upon its oral acceptance of the check, and as it had funds of that bank in its custody it prudently decided to retain enough to cover the amount until its rights should be settled or until it was otherwise indemnified.

The Watkins bank suffered no prejudice through the failure of the Interstate bank to learn on the 14th that the note would not be paid. The notice that it had been given credit was mailed to it after half-past 3 o'clock in the afternoon of that day. Even if this had justified an inference of the payment of the note, it would have been counteracted by the telephone message given before 9 o'clock the next morning. In any view of the case this was timely notice of nonpayment, and gave the Watkins bank every opportunity to which it was entitled to protect its interests.

We are unable to attach any significance to the circumstance that the Union Brokerage Company saw the Ringo & Askew note uncanceled in the possession of Ladd, Penny & Swazey on the morning of June 15th. Nor can we believe that the case is affected in any aspect by the fact that Ladd, Penny & Swazey deposited certain collateral with the Merchants' Bank to secure any claims against them, for it is expressly shown that the bank did not agree with them to pay the check in question. The case is a hard one for Ringo & Askew, but their misfortune results from the misappropriation of their funds by agents of their own selection. If the transactions between Ladd, Penny, & Swazey and the several banks had resulted in destroying the vitality of the first note, the purely fortuitous circumstance of a mistake occurring in a telephone conversation to which they were not a party would have enabled Ringo & Askew to shift their loss to one of the banks. If any principle of law enabled them to do this they ¹⁸¹ would, of course, be entitled to the full benefit of their good fortune. In the absence of any such legal doctrine there is no peculiar hardship in permitting the loss to remain where it originally lodged, nor is any rule of equity or good conscience thereby violated.

The judgment is reversed and the cause remanded, with directions to render judgment upon the findings in accordance with the views herein expressed.

All the justices concurring.

Porter, J., not sitting.

Payment.—*The Taking of a Check* is not usually considered as a payment of the debt for which it is taken: *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566; *Steinhart v. National Bank*, 94 Cal. 362, 28 Am. St. Rep. 132; *Johnson-Brinkman Commission Co v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615; *Burrows v. State*, 137 Ind. 474, 45 Am. St. Rep. 210; *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99.

A Bank Which Receives a note or draft for collection does not owe the amount thereof to the sender until collected; and, although it may enter a credit therefor in its books, the bank may treat such credit as provisional, and cancel it if the paper is afterward dishonored: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608. See, also, *Steinhart v. National Bank*, 94 Cal. 362, 28 Am. St. Rep. 132; *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 612.

METROPOLITAN LIFE INSURANCE COMPANY v. ELISON.

[72 Kan. 199, 83 Pac. 410.]

INSURANCE, LIFE—Insurable Interest.—An uncle of an insured has no insurable interest in his life by reason of kinship. (p. 191.)

INSURANCE, LIFE—Insurable Interest—Assignment.—A person cannot take directly, or by assignment, a policy of insurance on the life of one in whose life he has no insurable interest. (p. 191.)

INSURANCE, Life—Insurable Interest—Assignment of Policy. An agreement by which part of the insurance provided for in a life insurance policy is assigned by the insured and the beneficiary to one having no insurable interest in the life of the insured, upon consideration that the assignee is to pay all accruing premiums, is opposed to public policy, and neither such assignee nor beneficiary can recover on the insurance policy. (p. 193.)

INSURANCE, LIFE—Insurable Interest—Assignment of Policy.—A beneficiary of an insured who knowingly and purposely sells and assigns to another, who has no insurable interest in the life of the insured, the policy of insurance on the life of the latter, cannot enforce the policy for his own benefit. (p. 195.)

Action by Lizzie Elison on a policy of insurance issued on the life of her late husband, Adolph Elison, in which

she was named as beneficiary. She set up a contract between herself and her husband and his uncle, Casper Elison, by which an interest in the policy, to the extent of one thousand dollars, was assigned to him in consideration that he should pay the premiums on the policy. The contract was in writing, signed by the assured, the beneficiary, and Casper Elison. It recited that the assured had taken out a life insurance policy in the sum of two thousand dollars on his life, the quarter yearly premium of which was thirteen dollars and ninety-six cents, and that it was understood between the parties that Casper Elison should promptly pay these premiums as they fell due for the term of twenty years, or during the life of Adolph Elison, and that at his death, Lizzie Elison should pay to Casper Elison the sum of one thousand dollars. Lena Elison, the legal representative of Casper Elison, was made a defendant, and in a cross-petition alleged that Casper Elison had paid two premiums on the policy, aggregating twenty-seven dollars and ninety-two cents, and she claimed a recovery of one thousand dollars of the insurance by virtue of the contract of assignment. The defendant insurance company demurred to the petition of Lizzie Elison and also to the cross-petition of Lena Elison on the ground that neither stated a cause of action against the insurer. The trial court sustained the demurrer as to the cross-petition, but overruled it as to the original petition. The defendant insurance company then answered alleging that, although Adolph Elison, in response to the answers in the application, had stated that he was in good health and had never been sick, nor had a medical attendant, he was then in fact ill from tuberculosis and had been treated by a physician for that disease. Upon a trial, the issues were found in favor of Lizzie Elison and judgment entered against the defendant company, from which it appealed.

J. H. Austin, for the plaintiff in error.

S. W. Wicker and Fuller & Jackson, for the defendant in error.

202 JOHNSTON, C. J. The controlling question in the case is, Can the beneficiary, Lizzie Elison, who joined in the contract by which the insurance on her husband's life was assigned to Casper Elison, recover on the policy? In her petition, and in part as a basis of recovery, she set up the

contract, which appears to have been entered into with Casper Elison twelve days after the policy was issued. The demurrer to the petition raised the question whether, under the facts stated, as well as those admitted by the recitals of the contract, she had stated a cause of action. The contract is plain in its provisions and leaves no doubt ²⁰³ about the purposes of the parties. Casper Elison agreed to pay the premiums on the policy for twenty years, or until the death of Adolph Elison, and in consideration therefor was to receive one thousand dollars of the insurance money to be paid by the company. There was some claim that he was only to be reimbursed to the extent of the payments made, but it is expressly stated, and again repeated, that he was to receive one thousand dollars at the death of the insured, or at the maturity of the policy. He was to have the possession of the policy, and the precaution was taken to provide that the draft drawn by the insurance company in favor of Lizzie Elison should be indorsed and turned over to the assignee.

Casper Elison was an uncle of the insured, and therefore had no insurable interest in his life by reason of kinship: *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Prudential Ins. Co. of America v. Jenkins*, 15 Ind. App. 297, 57 Am. St. Rep. 228, 43 N. E. 1056; *Appeal of Corson*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; 2 *Joyce on Insurance*, sec. 1069. The consideration of the transfer was not advances made by the uncle, nor was the transfer made as security for any subsisting indebtedness. It therefore appears that Lizzie Elison, the beneficiary of the policy, undertook to assign and transfer an interest in the policy to one who had no interest in the life of the insured.

The theory of life insurance is that one who is interested in the preservation of the life of the insured may safely take and hold insurance, but that insurance in favor of one who has no interest in the life of the insured—who would be interested in his early death—is contrary to good morals and a sound public policy. In the early case of *Missouri etc. Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761, it was held that such insurance, if sustained, would open the door to speculation and traffic in human life and invite to enter the most shocking of all crimes, and that “of all wagering ²⁰⁴ contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most

persistent condemnation." The authorities generally unite in holding that one who has no insurable interest can no more take an interest in a policy, valid in its inception, by purchase and assignment than he could by direct issue from the insurer. In *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, it was said: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. . . . If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest."

It has been said: "The evil of wager policies would rather be aggravated than otherwise by such a rule, because speculators, desiring to indulge in this species of gambling in human life, could more easily purchase from embarrassed policy-holders than procure the issue of such policies directly to themselves upon the lives of strangers. 'In either case,' as observed by a recent author in treating of this subject, 'the holder of such policy is interested in the death, rather than the life, of the insured'": *Helmetag's Admr. v. Miller*, 76 Ala. 183, 52 Am. Rep. 316.

As tending to sustain the view that a person cannot take directly, or by assignment, a policy of insurance on the life of one in whose life he has no insurable interest, see *Cammack v. Lewis*, 82 U. S. 643, 21 L. ed. 244; *Gilbert v. Moose's Admrs.*, 104 Pa. 74, 49 Am. Rep. 570; *Carpenter v. United States Life Ins. Co.*, 161 Pa. 9, 41 Am. St. Rep. 880, 28 Atl. 943, 23 L. R. A. 571; *Alabama Gold Life Ins. Co. v. Mobile Mutual Ins. Co.*, 81 Ala. 329, 1 South. 561; *Whitmore v. Supreme Lodge Knights and Ladies of Honor*, 100 Mo. 36, 13 S. W. 495; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; ²⁰⁵ *Thornberg v. Aetna Life Ins. Co.*, 30 Ind. App. 682, 66 N. E. 922; *Bayse v. Adams*, 81 Ky. 368; *Roller v. Moore's Admr.*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Wilton v. New York Life Ins. Co.*, 34 Tex. Civ. App. 156, 78 S. W. 403.

In this case the interest of Casper Elison, who contracted with the beneficiary to pay all the premiums, would have been best subserved by the early death of Adolph Elison; and, in fact, death did occur in less than five months. It

was a matter of much concern to him whether he should get the contingent amount of one thousand dollars for a few premiums, or whether he should be required to pay them during the period of twenty years. In this respect it was more mischievous and vicious in its tendencies than many of such arrangements, because, if the insured had lived until the maturity of the policy, the assignee would have been required to pay even more than he was to receive. In that event he would have paid eleven hundred and sixteen dollars and eighty cents, saying nothing of interest, for the one thousand dollars of insurance money which he would receive; and, while there would have been a profit in the early death of the insured, his living until the end of the twenty year period would have occasioned the assignee a substantial loss. Contracts of this character have been frequently denounced and held bad because they were regarded as wagers, but this court has declared them to be void on the broader ground that they are contrary to public policy.

If the transaction is tainted as to the assignee, who has no insurable interest, how does it stand as to the beneficiary in the contract of insurance, who participated in the wrong? If the agreement which furnished an inducement to take human life and a temptation to commit the most atrocious of crimes was participated in by the beneficiary voluntarily, how can she escape the condemnation of the law? She not only signed the agreement, but it appears that she was to take an active part in carrying it out, and was to receive ²⁰⁶ a share of the insurance to be secured through the payment of premiums by Casper Elison.

We have given much attention to the relation which Lizzie Elison bore to the transaction, and if we follow the rule of *Life Ins. Co. v. McCrum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517, it must be held that the whole transaction was so tainted with illegality as to bar a recovery by her. There appears to be no substantial distinction between this case and the one cited. There the insurance company issued a paid-up policy to Snyder, payable to his two daughters. He and the beneficiaries, for a valuable consideration, joined in an assignment of the policy to Mrs. Parker, who had no insurable interest in Snyder's life. After the death of Snyder, Mrs. Parker, on learning that she could not collect the insurance, transferred the policy back to the beneficiaries, who in

turn transferred it to McCrum, and he brought an action to recover upon the policy. It was held that McCrum stood in the shoes of the beneficiaries; that the transaction between the beneficiaries and the assignee was contrary to public policy, not to be tolerated by law; and that the policy was worthless and void, not only as to the assignee but also in the hands of the beneficiaries. In speaking of the participation of the beneficiaries in the tainted transaction it was remarked: "This policy was placed in her [Mrs. Parker's] possession, not only with the written consent of the beneficiaries, but upon a valuable consideration paid to them for the same; they therefore aided in creating, in the mind of Mrs. Parker, a desire for the early death of the insured; they held out to her the temptation to bring about the event insured against. . . . In making the transfer and assignment, and in receiving the money therefor, the beneficiaries, Elizabeth and Desylvia Snyder, were participants with Mrs. Parker in the attempted fraud upon the insurance company; the whole transaction between the beneficiaries and Mrs. Parker contravenes public policy, and the law leaves the parties as it found them": Page 149.

²⁰⁷ Attention is called to the fact that in the McCrum case the beneficiaries received a consideration, while nothing was paid by the assignee to the beneficiary in the present case. Here Lizzie Elison procured Casper Elison to pay the premiums upon the policy in order to keep it alive, that she might receive a share of the insurance money. The fact that the assignee did not pay her money directly for the transfer did not take the vice out of the transaction nor make it less hurtful in its tendencies. It none the less, as was said in the McCrum case, aided in creating in the mind of the assignee a desire for the early death of the insured, and held out to him the temptation to bring about the event against which the insurance was issued. In the McCrum case the court further remarked: "If the party who attempts to speculate in human life cannot enforce the policy which he has purchased on the life of another, in whose life he has no insurable interest, the beneficiaries who knowingly and purposely sell and assign to such a person the policy on the life of another for a valuable consideration ought not thereafter to be permitted to enforce the same for their own benefit. . . . It is not for the sake of the insurance com-

pany that the transactions between the beneficiaries and Mrs. Parker are held wrongful, but such rule is founded on general principles of public policy forbidding speculative contracts upon human life. In all such cases the courts ought not to lend their aid to assist parties engaged in the perpetration or attempted perpetration of such wrongful speculations": Pages 150, 151.

The case of *Powell v. Dewey*, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381, sustains the view taken in the *McCrum* case. There Powell took out a policy of insurance on his own life and assigned the same to the beneficiary named in the policy, who had no insurable interest. The assignee paid the premiums which accrued up to the death of the insured. Upon proof of death the insurance company paid the amount of the policy to the assignee, and the executor of Powell's estate then brought an action on behalf of the estate ²⁰⁸ against the assignee and the insurance company to recover the insurance money. The court held that the policy was void because of the transfer to one having no insurable interest; that no action could be maintained upon it by the beneficiary against the insurance company, nor could the plaintiff, who was the representative of the insured, maintain an action, because, "looking at it in any view, it has its foundation on the policy which is void": See, also *Hinton v. Mutual etc. Co.*, 135 N. C. 314, 102 Am. St. Rep. 545, 47 S. E. 474, 65 L. R. A. 161.

The *McCrum* case is deemed to be a controlling authority in the present one, and the court is not inclined to overrule or modify that decision. It follows that the judgment must be reversed and the cause remanded, with directions to sustain the demurrer of the insurance company to the petition of Lizzie Ellison.

All the justices concurring.

The Assignment of Life Insurance Policies is the subject of a note to *Chamberlain v. Butler*, 87 Am. St. Rep. 484. Such an assignment may be made, according to the better opinion, to a person having no insurable interest in the life of the assured: *Harrison v. Northwestern etc. Ins. Co.*, 78 Vt. 473, 112 Am. St. Rep. 932; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 101 Am. St. Rep. 650. See, however, *Hinton v. Mutual Reserve etc. Assn.*, 135 N. C. 314, 102 Am. St. Rep. 545, and cases cited in the cross-reference note thereto.

CITY OF SALINA v. BLAKSLEY.

[72 Kan. 230, 83 Pac. 619.]

CONSTITUTIONAL LAW—Right to Bear Arms.—A constitutional provision that people have the right to bear arms for their defense and security applies only to the right to bear arms as a member of the state militia, or some other military organization provided by law, and does not prevent the enactment of a valid law prohibiting and punishing the carrying of arms or deadly weapons by private individuals. (p. 198.)

D. Ritchie, for the appellant.

R. A. Lovitt, for the appellee.

²³⁰ GREENE, J. James Blaksley was convicted in the police court of the city of Salina, a city of the second class, of carrying a revolving pistol within the city while under the influence of intoxicating liquor. He appealed to the district court, where he was again convicted, and this proceeding is prosecuted to reverse the judgment of the latter court. The question presented is the constitutionality of section 1003 of the General Statutes of 1901, which reads: "The council may prohibit and punish the carrying of fire-arms or other deadly weapons, concealed or otherwise, and may arrest and imprison, fine or set at work all vagrants and persons found in said city without visible means of support, or some legitimate business."

Section 4 of the Bill of Rights is as follows: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."

²³¹ The contention is that this section of the Bill of Rights is a constitutional inhibition upon the power of the legislature to prohibit the individual from having and carrying arms, and that section 1003 of the General Statutes of 1901 is an attempt to deprive him of the right guaranteed by the Bill of Rights, and is, therefore, unconstitutional and void. The power of the legislature to prohibit or regulate the carrying of deadly weapons has been the subject of much dispute in the courts. The views expressed in the decisions are not uniform, and the reasonings of the different courts vary. It has, however, been generally held that the legislatures can

regulate the mode of carrying deadly weapons, provided they are not such as are ordinarily used in civilized warfare.

To this view there is a notable exception in the early case of *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, where it was held, under a constitutional provision similar to ours, that the act of the legislature prohibiting the carrying of concealed deadly weapons was void; that the right of the citizen to own and carry arms was protected by the constitution and could not be taken away or regulated. While this decision has frequently been referred to by the courts of other states, it has never been followed. The same principle was announced in *Re Brickey*, 8 Idaho, 597, 101 Am. St. Rep. 215, 70 Pac. 609, but no reference was made to *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, nor to any other authority in support of the decision.

In view of the disagreements in the reasonings of the different courts by which they reached conflicting conclusions, we prefer to treat the question as an original one. The provision in section 4 of the Bill of Rights that "the people have the right to bear arms for their defense and security" refers to the people as a collective body. It was the safety and security of society that were being considered when this provision was put into our constitution. It is followed immediately by the declaration that standing armies in time ²³² of peace are dangerous to liberty and should not be tolerated, and that "the military shall be in strict subordination to the civil power." It deals exclusively with the military; individual rights are not considered in this section. The manner in which the people shall exercise this right of bearing arms for the defense and security of the people is found in article 8 of the constitution, which authorizes the organizing, equipping and disciplining of the militia, which shall be composed of "all able-bodied male citizens between the ages of twenty-one and forty-five years." The militia is essentially the people's army, and their defense and security in time of peace. There are no other provisions made for the military protection and security of the people in time of peace. In the absence of constitutional or legislative authority no person has the right to assume such duty.

In some of the states where it has been held, under similar provisions, that the citizen has the right preserved by the constitution to carry such arms as are ordinarily used in civilized

warfare, it is placed on the ground that it was intended that the people would thereby become accustomed to handling and using such arms, so that in case of an emergency they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency.

That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal constitution, which says: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here also the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose ²³³ is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law.

Mr. Bishop, in section 793 of the third edition of his work on Statutory Crimes, treating of this provision, which is found in almost every state constitution, says: "In reason, the keeping and bearing of arms has reference only to war, and possibly also to insurrections wherein the forms of war are as far as practicable observed."

The case of *Commonwealth v. Murphy*, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606, strongly supports the position we have taken. In that case the defendant was convicted of being a member of an independent organization that was drilling and parading with guns. The guns, however, had been intentionally made so defective as to be incapable of being discharged. The prosecution was had under a statute which provided: "No body of men whatsoever, other than the regularly organized corps of the militia [and certain other designated organizations], shall associate themselves together at any time as a company or organization, for drill or parade with firearms, or maintain an armory in any city or town of this commonwealth."

On the trial the defendant invoked the provision of the Massachusetts Bill of Rights that "the people have a right to keep and bear arms for the common defense" in support of

his contention that he had the right to bear arms. The court said: "This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities or towns, unless authorized so to do by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades."

The defendant was not a member of an organized ²²⁴ militia, nor of any other military organization provided for by law, and was therefore not within the provision of the Bill of Rights and was not protected by its terms. The judgment is affirmed.

All the justices concurring.

CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS.

I. Effect of United States Constitution, 199.

II. Effect of State Constitutions.

- a. Carrying Concealed Weapons, 200.
- b. Carrying Deadly Weapons Openly, 202.
- c. Miscellaneous, 203.

I. Effect of United States Constitution.

The second amendment to the United States constitution provides that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," but this does not give the right to bear arms for a purpose declared unlawful or in an unlawful manner.

Such amendment means no more than that it shall not be "infringed" by Congress, and has no other effect than to restrict the powers of the national government: *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29 L. ed. 615; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31 L. ed. 80.

As was well said in *State v. Smith*, 11 La. Ann. 633, 66 Am. Dec. 208: "The state statute against carrying weapons does not contravene the second article of the amendments of the constitution of the United States. The arms there spoken of are such as are borne by people in war or at least carried openly. . . . This [amendment] was never intended to prevent the individual states from adopting such measures of police as might be necessary, in order to protect the orderly and well-disposed citizens from the treacherous use of weapons not even designed for any purpose of public defense, and used most frequently by evil-disposed men who seek to take ad-

vantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke. There is, therefore, nothing in the constitution of the United States which requires of us a rigorous construction of the statute in question."

The second article of the amendments to the constitution of the United States securing to the people the right to keep and bear arms is a restriction upon the powers of the national government only, and not upon state legislation: *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *State v. Shelby*, 90 Mo. 302, 2 S. W. 468; *English v. State*, 35 Tex. 473, 14 Am. Rep. 374; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. In the case last cited the court, in speaking of the second article of the amendments of the United States constitution, said that "the keeping and bearing of arms, therefore, which, at the date of the amendment, was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets, arms to be used in defending the state and civil liberty, and not to pistols, bowie-knives, brass knuckles, billies and such other weapons as are usually employed in brawls, street fights, duels and affrays, and are only habitually carried by bullies, blackguards and desperadoes, to the terror of the community and the injury of the state": *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600.

II. Effect of State Constitutions.

a. Carrying Concealed Weapons.—The examination as to the constitutionality of state statutes relating to the keeping and bearing arms must, under the above construction of the second article of the amendments to the constitution of the United States, be made with reference to the respective constitutions of those states in which existing statutes were passed. The constitutions of the several states generally provide that every person shall have the right to keep and bear arms in the lawful defense of himself or the state. In some of them it is added that the legislature shall have the right to regulate the exercise of such right, while in others no limitation is added, and in either case the power of the state legislatures to make the carrying of concealed weapons a crime is now generally recognized and conceded by the great weight of authority: *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Owen v. State*, 31 Ala. 387; *Davenport v. State*, 112 Ala. 49, 20 South. 971; *State v. Buzzard*, 4 Ark. 18; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *Haile v. State*, 38 Ark. 564, 42 Am. Rep. 3; *Nunn v. State*, 1 Ga. 243; *Willis v. State*, 105 Ga. 633, 32 S. E. 165; *State v. Mitchell*, 3 Blackf. 229; *In re Brickey*, 8 Idaho, 597,

101 Am. St. Rep. 215, 70 Pac. 609; *State v. Smith*, 11 La. Ann. 633, 66 Am. Dec. 208; *Wilson v. State*, 81 Miss. 404, 33 South. 171; *State v. Wilforth*, 74 Mo. 528, 41 Am. Rep. 320; *State v. Shelby*, 90 Mo. 302, 2 S. W. 468; *State v. Speller*, 86 N. C. 697; *State v. Hogan*, 63 Ohio St. 202, 81 Am. St. Rep. 626, 58 N. E. 572, 52 L. R. A. 863; *Walburn v. Territory*, 9 Okla. 23, 59 Pac. 972; *Wright v. Commonwealth*, 77 Pa. 470; *Aymette v. State*, 2 Humph. 151; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *State v. Wilburn*, 7 Baxt. 57, 32 Am. Rep. 551; *English v. State*, 35 Tex. 473, 14 Am. Rep. 370; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. In speaking of the constitutional right to keep and bear arms in the lawful defense of the state or of the person, the court, in *Haile v. State*, 38 Ark. 566, 42 Am. Rep. 3, said that "the constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting more successfully their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens upon the occasion of any real or imaginary wrong. The 'common defense' of the citizen does not require that. The consequent terror to timid citizens, with the counter violence which would be incited amongst the more fearless, would be worse than the evil intended to be remedied. . . . The clause, upon this point, of the Tennessee bill of rights is similar to ours, except that it expressly reserves to the legislature the power, 'by law to regulate the wearing of arms, with a view to prevent crime.' We think this reservation a matter of superabundant caution, inserted to prevent a doubt, and that unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any muniments of the bill of rights. Only the legislature must take care that in regulating it does not destroy nor materially interfere with the objects of the constitutional provision. A Tennessee law passed under the constitution of 1871 prohibiting the carrying of any army weapon except openly and in the hand was held constitutional: *State v. Wilburn*, 7 Baxt. 57, 32 Am. Rep. 551"; *State v. Speller*, 86 N. C. 697. A statute prohibiting the carrying of concealed, dangerous and deadly weapons upon the person, and an exhibition of the same, is a reasonable regulation to which the citizen must yield, and is a valid exercise of the legislative power: *State v. Shelby*, 90 Mo. 302, 2 S. W. 468.

In *Bliss v. Commonwealth*, 2 Litt. 90, 13 Am. Dec. 251, it was decided that the right of the citizen to bear arms in defense of himself and of the state cannot be taken away or impaired, and that an act to prevent the carrying of concealed weapons was unconstitutional

and void. Since that decision, however, the constitution of Kentucky has been so amended as to give the legislature power to prevent persons from carrying concealed arms: *Hopkins v. Commonwealth*, 3 Bush, 480; and one may be found guilty in that state of carrying a concealed deadly weapon though he is simply carrying to the purchaser a pistol sold by another: *Cutsinger v. Commonwealth*, 7 Bush, 392. And it has also been decided that a citizen may be guilty of a crime in carrying, within his own home, a deadly weapon concealed upon his person contrary to a statute prohibiting the carrying of concealed weapons: *Wilson v. State*, 81 Miss. 404, 33 South. 171.

b. Carrying Deadly Weapons Openly.—As to the constitutional right to keep and bear arms openly, there is much conflict in the few decided cases. In *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, it was announced that a constitutional provision securing to the citizens of the state the right to keep and bear arms for their common defense relates to such arms as are used for the purposes of war, and does not prevent the legislature from prohibiting the wearing of such weapons as are not used in civilized warfare, and would not contribute to the common defense. And a statute which prohibits the carrying of any pistol whatever as a weapon refers to such pistols as are usually carried in the pocket, and of a size to be concealed about the person and used in private quarrels, and not such as are within the provisions of the constitution. "In order to arrive at what is meant by this clause of the state constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is arms; that is, such weapons as are properly designated as such as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above, that is, the efficiency of a citizen as a soldier, when called upon to make good the defense of a free people, and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus to use? Not everything that may be useful for offense or defense, but what may properly be included or understood under the title of 'arms' taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberty, as well as of the state.

"Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle of all descriptions, the shotgun, the musket and repeater are such arms, and that, under the constitution, the right to keep such arms cannot be infringed or forbidden by the legislature. Their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve

the general good so as not to infringe the right secured and the necessary incidents to exercise of such right": *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556. The same principles are adopted and the same rule laid down in *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8, *English v. State*, 35 Tex. 473, 14 Am. Rep. 374, and *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. Other cases maintain that a law which merely inhibits the wearing of certain weapons in a concealed manner is valid, but if it attempts to cut off the exercise of the right of the citizen to bear "arms" openly, or, under the color of prescribing the mode, renders the right itself useless, it is in conflict with the constitution and void: *Nunn v. State*, 1 Ga. 243; *In re Brickey*, 8 Idaho, 597, 101 Am. St. Rep. 215, 70 Pac. 609. It has been held, also, that a city ordinance prohibiting the carrying of a pistol either openly or concealed is repugnant to the constitution and void: *State v. Rosenthal*, 75 Vt. 295, 55 Atl. 610.

In *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52, it was said that: "But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey . . . or when acting in the aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms."

A statute prohibiting a citizen from bearing arms, in this case an ordinary pocket pistol, openly, is, it has been held, in conflict with the constitution and void: *Nunn v. State*, 1 Ga. 243; *Stockdale v. State*, 32 Ga. 225.

c. *Miscellaneous*.—A state statute prohibiting all bodies of men other than the regularly organized volunteer militia of the state and the troops of the United States from associating together as military organizations, or drilling or parading with arms in any city of the state without license from the governor, is constitutional and valid: *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29 L. ed. 615; *Commonwealth v. Murphy*, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606. A statute to this effect exists in California: Cal. Pen. Code, sec. 734.

It may be made a crime by statute to keep and bear arms of any kind in the presence of a court of justice: *Hill v. State*, 53 Ga. 472; and a statute which makes it a crime to keep and sell pistols except army or navy pistols is constitutional and valid: *Dabbs v. State*, 39 Ark. 353, 43 Am. Rep. 276; *State v. Burgoyne*, 7 Lea, 173, 40 Am. Rep. 60.

HUMBARGER v. HUMBARGER.

[72 Kan. 412, 83 Pac. 1095.]

PROBATE COURTS have Jurisdiction to settle and sign bills of exceptions. (p. 205.)

APPELLATE PRACTICE—Bill of Exceptions.—If a bill of exceptions itself recites that certain evidence and rulings are attached to and made a part of such bill, and they are so plainly identified that no doubt can exist that they were settled by the court as a part of the bill of exceptions, they may be considered on appeal as such. (pp. 205, 206.)

APPEAL—Record on—Date of Proceedings.—If the record on appeal states that the hearing began on a certain day, and each successive step in the proceedings, including the settling and signing of the bill of exceptions, is introduced by the term "thereupon," without naming any other date, it must be inferred that each step followed the other without delay, and that all occurred on the date of the hearing. (p. 206.)

PROBATE COURTS—Summary Proceedings to Discover and Recover Property.—Summary proceedings in probate courts authorized by statute for the discovery and to compel the delivery of property of an estate suspected of having been concealed, embezzled or conveyed, cannot be employed to enforce the payment of a debt, or liability for the conversion of the property of the estate, or to try controverted questions of the right to property as between the representative of the estate and others. (p. 207.)

Z. C. Millikin, for the plaintiffs in error.

D. Ritchie, for the defendant in error.

413 **JOHNSTON, C. J.** This was a summary proceeding begun in the probate court upon a complaint of John Humbarger, an heir at law of Susan Humbarger, deceased, in which he alleged that his brothers, Henry Humbarger, George Humbarger and Thurston Humbarger, were concealing money, property and effects of the estate of Susan Humbarger, deceased, and asked that they be cited to appear and answer questions propounded to them by the court touching such concealment. A citation was issued and an examination had, at the end of which the probate court found that there was no concealment of the assets of the estate by the respondents, and the proceeding was discontinued. In the course of the hearing the probate court sustained objections to questions asked of Henry Humbarger, and to these rulings exceptions were taken. A bill of exceptions was presented to, and allowed by, the probate court, and this was made the basis

of a proceeding in error in the district court. That court reversed the decision of the probate court, and of these rulings plaintiffs in error complain.

The first contention is that the district court had no jurisdiction to review the rulings of the probate court in the admission of testimony, because such rulings never became a part of the record. The ground of this claim is that the probate court had no power to settle and sign a bill of exceptions. Aside from the right of appeal from a decision of the probate court, express authority is given for the review of its judgments and final orders by a proceeding in error to the district court: Code, sec. 541; Gen. Stats. 1901, sec. 5018. It is argued, however, that as the jurisdiction of the probate court is limited, it has only such authority as is specifically conferred, and that the right to prosecute a proceeding in error from that court does not ⁴¹⁴ imply that it has authority to settle and sign a bill of exceptions. There appears to be express legislative authority for the settling and signing of a bill of exceptions by the probate court. The statute declares that probate courts are courts of record: Gen. Stats. 1901, sec. 1974. By another statutory provision courts of record and the judges thereof at chambers are given authority to settle and sign bills of exceptions, and also to extend the time for doing so beyond the term: Laws 1901, c. 275, sec. 1; Gen. Stats. 1901, sec. 4753.

It is next contended that the evidence and rulings were attached to, rather than embodied in, the bill of exceptions, and were not so preserved as to make them a part of it. It is true that a mere reference to papers or proceedings, without embodying them in the bill of exceptions, is not sufficient. They must be made a part of the bill of exceptions in some way, and so plainly identified as a part of it that no mistake can be made as to what is included in the bill. Here it is recited in the bill that the evidence is "attached hereto, and made a part of this bill of exceptions." Since the evidence and rulings are fully identified and specifically made a part of the bill, they cannot be ignored because of the manner in which they were incorporated into it, or because of the part of the bill in which they were placed. It is a better and safer method to place the proceedings and papers to be preserved in the body of the bill, preceding the signature of the judge, and thus avoid any question as to what is incorporated in it.

The courts give a liberal construction to a bill, and are inclined to disregard mere normal defects and irregularities that do not cloud the record or violate a statutory requirement. In this case there can be no misapprehension as to what the bill contains, nor whether the evidence and rulings in question were settled by the probate court as a part of the bill of exceptions.

Although questioned, it sufficiently appears that the bill was settled in good time. The final hearing began ⁴¹⁵ on February 8, 1904, and in the recitals of the subsequent steps, including the order of the court and the settling and signing of the bill of exceptions, each is introduced by the word "thereupon." So used, the word means that one step followed another immediately and without delay, and justifies the conclusion that all occurred on the date of the hearing: *Dewey v. Linscott*, 20 Kan. 684; *Hill v. Wand*, 47 Kan. 340, 27 Am. St. Rep. 288, 27 Pac. 988.

The final question raised in the case is, Did the probate court err in rejecting further evidence and in discontinuing the proceeding? The asset of the estate involved in the inquiry was a promissory note given by Henry Humbarger to his father. The only thing charged in the complaint was concealment. Without hesitation Henry Humbarger testified that the note had been given, and he stated the amount for which it was given, and, further, that it had been fully paid and the debt discharged. He went further, and stated that it had been paid partly in money, partly in services, and partly in board. The complainant tried to push the inquiry still further as to the payment of the note and as to whether Henry's liability thereon had been discharged. His liability on the note could not be determined in that proceeding by that court. It was a summary proceeding brought under section 3002 of the General Statutes of 1901. That statute provides: "Upon complaint made to the probate court by the executor, administrator, creditor, devisee, legatee, heir, or other person interested in the estate of any deceased person, against any person suspected of having concealed, embezzled or conveyed away any money, goods, chattels, things in action, or effects of such deceased, the said court shall cite the person suspected forthwith to appear before it and to be examined on oath or affirmation touching the matters of the said complaint."

The testimony of the parties examined is to be reduced to writing and filed in the probate court, and if the court is of opinion that the accused is guilty of ⁴¹⁶ either concealing, embezzling or conveying away any of the assets of the estate, it may order and compel the delivery thereof to the executor or administrator or person entitled to receive the same: Gen. Stats. 1901, secs. 3002-3006. The purpose of the proceeding is to make discovery and compel production of the property of an estate suspected of having been concealed, embezzled, or conveyed away, but it cannot be employed to enforce the payment of a debt or liability for the conversion of property of an estate, or to try controverted questions of the right to property as between the representative of the estate and others. One purpose is to perpetuate evidence against the party charged, to be used, if necessary, in an action brought for the recovery of the property in a court of competent jurisdiction. In *Moss v. Sandefur*, 15 Ark. 381, it was held under a similar statute that it was intended to compel a discovery and delivery of the assets of an estate which were secretly and unlawfully held, but that it did not invest the probate court with jurisdiction of contested rights and matters of litigation as to the title of property. A like provision was before the supreme court of Illinois in *Dinsmoor v. Bressler*, 164 Ill. 211, 45 N. E. 1086, where it was said: "The summary proceeding in the probate court to compel the production and delivery of property 'is not the proper remedy . . . to try contested rights and title to property between the executor and others': 2 Woerner's American Law of Administration, sec. 325, p. 681. 'Nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute': 1 Woerner's American Law of Administration, sec. 151, p. 347; Schouler on Executors and Administrators, sec. 270. If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial": See, also, *In re Wolford*, 10 Kan. App. 283, 62 Pac. ⁴¹⁷ 731; *Howell v. Fry*, 19 Ohio St. 556; *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 220; *Gibson v. Cook*, 62 Md. 256; *Matter of Beebe*, 20 Hun, 462.

Here the charge was concealment, and when the testimony developed that there was no concealment of the note—the subject of inquiry—the end of the investigation was reached. No doubt existed that there was a note, and that it belonged to the estate; and the only question left was whether it had been paid by Henry Humbarger, or whether he was still liable for all or part of it. The proceeding was a proper remedy to compel the delivery of the note itself, if it had been concealed, but not to enforce its payment, nor to try the title to the note as between parties claiming to own it. Courts will not be disposed to hamper such investigations so long as there remains a question whether effects of the estate have been concealed, embezzled, or conveyed away, but where, as in this case, the charge is not sustained, and it appears that there was no concealment, further inquiry as to the payment and whether there still existed any liability is useless, and beyond the scope of the proceeding. The probate court rightly refused to go into the question of the indebtedness of the respondent Henry Humbarger, and therefore the judgment of the district court is reversed and the cause remanded for further proceedings.

All the justices concurring.

SUMMARY PROCEEDINGS TO DISCOVER OR RECOVER PROPERTY OF ESTATES OF DECEDENTS.

- I. Statutory Provisions, 208.
- II. Constitutionality of Statutes, 210.
- III. Nature of Proceedings, 211.
- IV. Scope and Object of Proceeding.
 - a. Generally, 211.
 - b. Collection of Debts, 213.
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- VIII. Proceedings Against Personal Representative, 218.
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I. Statutory Provisions:

In addition to existing remedies at law and in equity entitling administrators and executors to recover the property of an estate, a summary proceeding in the probate court is provided in many of the states, enabling them, or an interested person in such estate, to make

examination and discovery, and in some states to compel the production and delivery of property suspected to be concealed, embezzled or wrongfully withheld. Such statutes furnish a more speedy and much less expensive mode of detecting the existence or location of the property of the estate than the ordinary remedy of bill of discovery in equity or replevin or other action at law.

These statutes, generally speaking, are almost uniform in their phraseology and legal effect, and it is not deemed necessary to here set them out in each particular instance in full. They authorize probate courts to cite before them for examination any person suspected by an executor or administrator, or other person interested in the estate, of having concealed, embezzled, or converted any goods, chattels or money, or having in his or their possession or knowledge of any evidence of debt or right of the deceased, and compel such person to answer under oath. The proceeding in such case is plenary, the object being to perpetuate the evidence against the person charged, to be used upon any action to be brought thereon, and the testimony, it is usually provided, must be reduced to writing.

Statutes of this tenor exist in the following states: California (Code Civ. Proc., sec. 1459 et seq.); Idaho (Rev. Stats. 1887, secs. 5432-5434); Indiana (Annotated Stats. 1894, sec. 2455); Maine (Rev. Stats. 1903, 66, secs. 70-72); Maryland (2 Pub. Gen. Laws 1888, art. 93, sec. 238, p. 1399); Massachusetts (2 Rev. Laws 1902, c. 162, sec. 43); Michigan (3 Comp. Laws 1897, c. 25, secs. 8-10); Minnesota (Gen. Stats. 1891, secs. 5712, 5713); Nevada (Prot. Code Stats. 1895, sec. 2572); New Hampshire (Pub. Stats. 1901, c. 190, secs. 1-4); New York (Code Civ. Proc., sec. 2706 et seq.); Oregon (Gen. Laws, 1887, sec. 1121 et seq.); Ohio (2 Bates Ann. Stats., 2d ed., secs. 6053-6057); Rhode Island (Gen. Laws 1896, pp. 696, 697); Vermont (Stats. 1904, sec. 2470); Washington (2 Ballinger's Annotated Codes and Statutes, secs. 6212-6214); Wisconsin (Ann. Stats. 1889, secs. 5446, 5447). Under such statutes a like proceeding is authorized against persons to whom the executor or administrator has intrusted property of the estate, and who wrongfully withholds it, and the appearance of such parties and their answers to the interrogatories propounded to them may be enforced by attachment and imprisonment.

In other of the states the power of the probate court is, by statute, made to extend much further, and the person found guilty of concealing, embezzling or wrongfully withholding property belonging to the estate may be proceeded against by attachment and imprisonment. Statutes to this effect exist in Illinois (Rev. Stats. 1891, c. 3, secs. 80, 81); Maryland (2 Pub. Gen. Laws 1888, art. 93, sec. 238, p. 1391); North Dakota (Code 1895, sec. 6379); South Dakota (2 Ann. Stats., secs. 7005, 7006); Utah (Rev. Stats. 1898, secs. 3927, 3928); Wyoming (Rev. Stats. 1887, secs. 2045-2047).

II. Constitutionality of Statutes.

Statutes authorizing summary proceedings for the discovery of property of a decedent wrongfully withheld from his legal representatives, in so far as they authorize an examination of the question of possession only and not that of title, are undoubtedly constitutional, and not in conflict with constitutional provisions declaring that no person shall be deprived of life, liberty or property without due process of law, and that trial by jury in all cases in which it has theretofore been used shall remain inviolate: *Matter of Curry*, 25 Hun, 321.

In California it has been decided that a statute providing for proceedings by an administrator to recover property of the estate of a decedent alleged to have been concealed or embezzled by the defendant and converted to his own use is remedial, and not penal, in its nature, though providing redress in the way of imprisonment and damages under certain contingencies as a means of enforcing the civil remedy provided for therein, and is not in conflict with constitutional provisions that no person shall be compelled in a criminal case to be a witness against himself, and that the right of the people to be secured in their persons, houses, papers, and effects against unreasonable seizures and searches cannot be violated: *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811.

In a summary proceeding before the probate court as authorized by statute on the complaint of an administrator against a person suspected of embezzling, concealing or conveying away the property or effects of the estate, the court has no constitutional power to render judgment against the person so charged, except for such property or effects as he, on his examination, admits himself guilty of having in his possession, and to the extent that such statute authorizes a judgment in cases where there is a controversy between the parties, it is unconstitutional as depriving such person of the right of trial by jury, and of appeal: *Howell v. Fry*, 19 Ohio St. 556. In *Dinsmoor v. Bressler*, 164 Ill. 211, 45 N. E. 1086, it was said that if such statutory proceedings "could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial." And this language was repeated with approval in *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694. Or if such statute authorizes the probate court, if it shall appear that any effects of the deceased are withheld by the person under examination, to issue a warrant commanding an officer to whom it is directed to search for and seize such effects and deliver them to the personal representative of the deceased, unless the person holding such effects shall give security, is unconstitutional and void as depriving a person

of his property without due process of law: *Matter of Beebe*, 20 Hun, 462.

III. Nature of Proceeding.

Under statutes concerning the discovery of concealed assets of an estate, the proceeding partakes of a suit in chancery, and is in the nature of a bill for discovery and relief, and the evidence heard in the circuit court on appeal therefrom may be preserved for review by the certificate of the judge in the form of a bill of exceptions: *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694. The statutory proceeding for the discovery of assets of an estate is in the nature of a bill in chancery for discovery, and the proceedings should be governed by the principles of and practice in equity: *Adams v. Adams*, 81 Ill. App. 637. But a statute authorizing the probate court, on an executor's or administrator's application, to examine a person under oath concerning property in his possession belonging to the estate, is not exclusive of the right of the personal representative to maintain a bill in equity for discovery with respect to such property: *Starkweather v. Williams*, 21 R. I. 55, 41 Atl. 1003.

IV. Scope and Object of Proceeding.

a. **Generally.**—If an executor, administrator or other person interested in an estate states upon oath to the probate court that he believes that some third person has in his possession any goods, chattels, money or effects, books of account, papers or any evidence of debt whatever, it is the duty of the court to require such person to appear before it by citation, and the court may examine him on oath, and hear the testimony of such executor or administrator or other person interested in the estate and other evidence offered by either party, but in such case the statute leaves it discretionary with the court to examine or not to examine the person against whom such proceedings are had: *Mahoney v. People*, 98 Ill. App. 241. The court is not confined to an examination of, nor need it examine, the defendant, but either party has the right to introduce any evidence pertinent to the issue: *Wade v. Pritchard*, 69 Ill. 279. The statute does not confer authority upon the court to try and determine, as an issue of fact, upon general evidence, the question whether a person, suspected of so doing, has taken wrongful possession of property or effects of the estate, but merely to summon and compel the appearance of such person, and subject him to an examination under oath, and in case it appears therefrom that he has property belonging to the estate, to order and compel the delivery of such property to the administrator: *Rickman v. Stanton*, 32 Iowa, 134. The sole purpose of a statute, in so far as it provides that if any executor or administrator or other person interested in the estate of a deceased person shall complain to the judge of probate that any person is suspected to have in his possession any property belonging to such estate, is to

enable such judge to cite such suspected person to appear before the court of probate, and to examine him on oath, upon the matter of such complaint: *Manly v. Babbitt*, 99 Mich. 441, 58 N. W. 367. One of the objects of such statutes is to enable the administrator to secure information as to property which he is required to inventory or appraise, although the present situation of the property is such that it would be impracticable to order its delivery to the administrator: *Matter of O'Brien*, 65 App. Div. (N. Y.) 282, 27 N. Y. Supp. 1001.

Such summary proceedings under the statute apply only where persons charged with concealing or embezzling the assets of an estate have the goods in actual possession at the time of the commencement of the proceedings. If the property has passed from the possession of the person so charged, the common-law rights of action still remain to the executor or administrator, but he is precluded from further prosecuting the statutory remedy: *Dameron's Admr. v. Dameron*, 19 Mo. 317; *Howell v. Howell*, 37 Mo. 124.

And such proceedings can only be used for and result in the discovery of facts to serve as a basis of ulterior proceedings: *O'Dee v. McCrate*, 7 Me. 467; *Dodge v. McNeil*, 62 N. H. 168; *Saddington's Estate v. Hewitt*, 70 Wis. 240, 35 N. W. 552, where it is also decided that where the statute authorizes merely an examination, it cannot be changed by rule of court into a proceeding in the nature of an action to recover the property as to which the examination is had. And as such ulterior proceedings cannot be had in the probate court under some of the statutes, that court can do nothing except to take the examination of the person complained of, and the judge thereof has no authority to determine the question whether such charge is or is not sustained: *Dodge v. O'Neil*, 62 N. H. 168.

Under statutes which authorize an order for the surrender and delivery of the property sought to be discovered, the only purpose of the legislature in enacting them is to provide for the examination of the person claimed to have property belonging to the estate at the instance of the personal representative of the decedent or of some person interested in his estate, and to afford a simple and summary proceeding whereby such person may obtain an order for the surrender of the property discovered in the hands or under the control of some person or persons not lawfully entitled to the possession thereof, and, whenever it is apparent at any stage of the proceedings taken under such statutes that such a result is in the nature of things unattainable, the proceeding should terminate: *Estate of Knittel*, 12 Civ. Proc. (N. Y.) 1.

Such summary proceedings against, and the commitment of any person having property belonging to any deceased person which he refuses to disclose or deliver to the administrator, apply only to money or property remaining in specie and unchanged, and not

to proceeds of collections made by an attorney under employment to the administrator: *Dinsmor v. Bressler*, 164 Ill. 211, 45 N. E. 1086.

A proceeding in the probate court to discover assets begun on the affidavit of a person interested in the estate of a deceased, in which a certain other person is charged with having concealed and embezzled certain assets is "a suit pending" within the meaning of a statute concerning the taking of depositions: *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552; *Eckerle v. Wood*, 95 Mo. App. 378, 69 S. W. 45.

And on an application by an administrator to the probate court invoking its authority to require the production by a third person of any part of the personal estate of his decedent, he must allege in his application in express or equivalent terms that the same is concealed, in order to give the court jurisdiction. The simple withholding of property is not "concealment" within the meaning of the statute: *Taylor v. Bruceup*, 27 Md. 219.

b. **Collection of Debts.**—Statutes which authorize summary proceedings before courts of probate against any person having property of an estate in his possession and refusing to deliver it up to the personal representative of the deceased are not intended to apply to a case of mere indebtedness of such person to the estate, but only to the case of specific property belonging to such estate, and wrongfully withheld by such person: *Ive's Appeal*, 28 Conn. 416. Such proceedings cannot be maintained to aid in the collection of debts due the estate, but only for the purpose of obtaining possession of the identical articles or money belonging to such estate: *Williams v. Conley*, 20 Ill. 643; *Matter of Stewart*, 77 Hun, 564, 28 N. Y. Supp. 1048. The personal representative of an estate has no right to examine a debtor of his decedent merely for the purpose of ascertaining the nature and amount of such debtor's liability to the estate: *Estate of Knittel*, 12 Civ. Proc. (N. Y.) 1; *Estate of Nay*, 6 Dem. Sur. 346; *Matter of Carey*, 11 App. Div. (N. Y.) 289, 42 N. Y. Supp. 346. Probate courts have no jurisdiction under such statutes, by any proceedings, to enforce the payment of a debt due the estate by commitment as for a contempt: *In re Wolford*, 10 Kan. App. 283, 62 Pac. 731. In a summary proceeding before a probate court under authority of a statute on the complaint of an administrator against a person suspected of embezzling, concealing or conveying away the property or effects of the estate, the court has no constitutional power to render judgment against the person so charged, except for such property and effects as he, on his examination, admits himself guilty of having in his possession, and to the extent that the statute professes to authorize a judgment in cases where there is a controversy between the parties, it is unconstitutional and void: *Howell v. Fry*, 19 Ohio St. 556.

c. **Trial of Title.**—Probate courts have no jurisdiction, under the summary proceedings provided by statute for the discovery and recovery of property of a decedent wrongfully withheld from his legal representatives, to try the title to such property as between the executor or administrator and others. The question of possession only, and not that of title, can be examined: *Moss v. Sandefur*, 15 Ark. 381; *In re Wolford*, 10 Kan. App. 283, 62 Pac. 731; *Gibson v. Cook*, 62 Md. 256; *Estate of Curry*, 25 Hun, 321; *Summerfield v. Howie*, 2 Red. Sur. 149; *Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 220. In such proceedings neither the probate court nor the circuit court on appeal can finally determine the title or right to property between bona fide disputants, as the good faith of the person in possession of the assets is the sole question to be tried in such proceeding: *Johnson v. Johnson*, 82 Mo. App. 350. The court has no power to order property in the possession of the person examined and claiming title thereto to be delivered up to the personal representative of the deceased, or deposited subject to the order of the court, and the refusal of such person claiming title to obey such order is not a contempt: *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118.

V. Claim of Property.

Where an administrator or executor, seeking to discover property of his decedent alleged to be concealed or withheld, alleges that the person to be cited has in his possession or under his control specified articles of property belonging to the estate, the New York state statute provides that "in case the person so cited shall interpose a written answer, duly verified, that he is the owner of such property, or is entitled to the possession thereof, by virtue of any lien thereon, or special property therein, the surrogate shall dismiss the proceeding as to such property so claimed." Under such provision of the statute, the assertion by the person cited of his own title to a portion only of such property, does not bar further inquiry, and is not ground for a dismissal of the proceedings: *Matter of Peyser*, 25 Misc. Rep. (N. Y.) 705, 4 N. Y. Supp. 707; *Estate of Elias*, 4 Dem. Sur. 139. The person cited must allege that he or she is the owner or is entitled to the possession of the specific property described in the petition by virtue of a lien thereon or special property therein, and if such allegation is not made, the motion for discovery must be granted and the examination must proceed: *Estate of Hastings*, 6 Dem. Sur. 423; *Estate of Seaver*, 1 Dem. Sur. 365.

When the person cited for examination interposes a written answer, duly verified, alleging that by virtue of a lien on the property of which a discovery is sought, or special property therein, he is entitled to the possession thereof and setting forth the nature and circumstances of the lien, the surrogate must dismiss the proceeding, and it is not within his power to pass upon the validity, sufficiency or

extent of such lien: *Matter of Lynch*, 83 Hun, 39, 31 N. Y. Supp. 767. When the proper claim of title is interposed, the surrogate is ousted of jurisdiction and cannot decide the question raised, the parties being remitted to another tribunal, where a jury trial or other proper disposition of the issues may be had. Under such circumstances, no examination is permissible, and if it were allowed no order could be made for the delivery or disposition of the property based upon it: *Estate of Basch*, 24 Civ. Proc. (N. Y.) 264, 33 N. Y. Supp. 424. If the person cited for examination alleges by proper answer that he is the owner of the property in question, that is sufficient to secure a dismissal of the proceeding, without showing how he became such owner, but if he claims to be entitled to the possession of the property by virtue of a lien thereon or special property therein, he must allege the facts necessary to sustain such claim: *Estate of Seaver*, 1 Dem. Sur. 365. And if such person alleges in his answer that "he is the owner of all property specifically recited in said petition, or entitled to the possession thereof," he is not entitled to a dismissal of the proceeding, as such answer is not an absolute claim of ownership or of a right of possession by virtue of a lien thereon, or special property therein, but is merely a naked alternative claim to the property: *Matter of Peyser*, 35 App. Div. (N. Y.) 447, 54 N. Y. Supp. 832.

If the person cited for examination has possession of papers, the delivery of which is sought to be compelled by the administrator, and claims a lien thereon for services rendered by him as an attorney at law for the decedent, it is the duty of the surrogate to dismiss the proceedings: *Matter of McGuire*, 106 App. Div. (N. Y.) 131, 94 N. Y. Supp. 97.

In *Matter of Wing*, 41 Hun, 452, it appeared that in obedience to a citation issued by a surrogate upon the petition of an administrator, alleging that the respondent had in his possession property, bonds and notes which belonged to the deceased, and which he ought, but refused, to deliver to the administrator, the respondent appeared and answered, reciting that the property in question was placed in his hands by the deceased under agreement with him that the latter should hold it for advances made to the deceased which were never repaid, and that the respondent, as by agreement provided, disposed of the property in the lifetime of the deceased, and applied the whole of the proceeds to his reimbursement, and that he had none of the property in his possession, and it was held that it was the duty of the surrogate to have dismissed the proceedings.

An answer to a petition for the examination of a person cited for discovery of the assets of an estate of a decedent, which sets up ownership and title of the property by virtue of a bequest to him, requires a dismissal of the proceeding under the provision of the above-mentioned New York statute: *Matter of McCarthy*, 26 Civ.

Proc. (N. Y.) 397, 47 N. Y. Supp. 1127; Matter of Harriman, 50 Misc. Rep. (N. Y.) 245, 100 N. Y. Supp. 481. And under the statutes of other states authorizing summary proceedings for the discovery and delivery of property of an estate alleged to be concealed or embezzled by a third person, if there is substantial evidence on such examination that the deceased made a valid gift of the property sought for, and that the gift was made in view of death, and that respondent was in lawful possession of such property prior to the decedent's death, claiming title thereto in good faith, he is entitled to a dismissal of the proceeding: *Hoehn v. Struttman*, 71 Mo. App. 399. Or if it appears from the evidence that the administrator's intestate had no title to the property sought, or that the respondent's appropriation of it was not fraudulent, but in good faith under a valid claim of title, the respondent should be acquitted of the embezzlement, and should not be compelled to surrender the property. Beyond this the probate court has no jurisdiction to settle the respective rights of the parties to the property, and if they wish to litigate their rights to the property they must resort to some other jurisdiction: *Gordon v. Eans*, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

Under the New York statute an executor or administrator who presents a petition to the surrogate showing that the property of the estate which should be included in an inventory or appraisal, and which is in the possession, under the control or within the knowledge or information of a person who withholds it from the representative of the deceased, is entitled to an order permitting him to examine such person, and this statute applies in favor of an administrator appointed in the state of the residence of the deceased as against his temporary administrator appointed to administer that part of his estate situated in another state: *Matter of O'Brien*, 65 App. Div. (N. Y.) 282, 72 N. Y. Supp. 1001, 34 Misc. Rep. (N. Y.) 436, 69 N. Y. Supp. 1022. And the person sought to be examined cannot defeat the examination by an answer alleging that he has no property belonging to the estate in his possession, and that he is the absolute owner of the property described in the petition, and was such owner before the decedent's death. The proceeding is intended to enable an executor or administrator to obtain information in regard to such property as well as to get possession of it, and, although the case is one where delivery of possession could not be directed, an examination of the claimant may, nevertheless, be allowed, and the provision for terminating the proceeding where a dispute arises as to the ownership of the property refers to a dispute developed upon the examination of the claimant, and not a dispute which he creates by allegations in an answer to a petition for his examination: *Matter of Gick*, 49 Misc. Rep. (N. Y.) 32, 98 N. Y. Supp. 299; *Matter of O'Brien*, 34 Misc. Rep. (N. Y.) 436, 69 N. Y. Supp. 1022, 65 App. Div. 282, 72 N. Y. Supp. 1001.

VI. Rights of Person Examined.

Under statutory proceedings to compel a person to answer touching the assets of an estate in his possession, such person is not entitled to a trial by jury in such proceeding as a matter of right: *Mahoney v. People*, 98 Ill. App. 241. Although the statute sometimes provides for a jury trial in such case: Rev. Stats. 1887, sec. 2045 et seq.

A person charged with withholding the assets of an estate has the right to be examined under oath, and the court may believe and act upon his uncontradicted statements, and may permit him to testify to facts occurring prior to the death of the deceased: *Kraher's Estate v. Launtz*, 90 Ill. App. 496. And in the event of the finding of the court in his favor after his examination under oath, he is entitled to an immediate dismissal of the proceedings without further examination of himself or other witnesses: *Matter of Stuart*, 67 Mo. App. 61. He also has the right to introduce any evidence pertinent to the issue: *Wade v. Pritchard*, 69 Ill. 279. And he is entitled to have the assistance of counsel in such a proceeding: *Martin v. Clapp*, 99 Mass. 470.

VII. Person Interested.

Under a statute authorizing the probate court to issue a citation for the discovery of the assets of an estate upon the affidavit of the executor, administrator or "other person interested in the estate," it has been held in Missouri that if the affidavit alleging concealment or embezzlement does not affirmatively show that the person making it has an interest in the estate; it is defective and gives the court no jurisdiction: *Shaw v. Groomer*, 60 Mo. 495. But if the probate court issues a citation at the instance of the moving party, it necessarily decides that he is "a person interested in the estate," and such decision cannot be reviewed by writ of prohibition: *Eckerle v. Wood*, 95 Mo. App. 378, 69 S. W. 45. The order of such court issuing a citation on the affidavit of the husband of the testatrix is a decision by the probate court that such husband is interested in the estate: *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552.

The husband of a childless testatrix, although the will under which he acts may specifically declare that he is to have no part of the estate, has such an interest therein as to authorize the probate court, upon his affidavit that certain persons are concealing certain assets, to issue a citation to them for the discovery thereof: *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552.

If the probate court becomes satisfied from any source that property belonging to an intestate's estate is wrongfully in the possession or under the control of a third person, it may cite him for examination independently and without any petition from a person in-

terested in the estate or from the administrator: *Hughes v. People*, 5 Colo. 436; *Mead v. Sommers*, 2 Dem. Sur. 296.

VIII. Proceedings Against Personal Representative.

Statutes providing summary proceedings upon the petition or affidavit of a person interested in the estate of a decedent for the purpose of discovering assets of such estate alleged to be concealed, embezzled or wrongfully withheld apply as well against executors and administrators as they do against persons: *Case's Appeal*, 35 Conn. 115; *O'Dee v. McCrate*, 7 Me. 467; *Stewart v. Glenn*, 58 Mo. 481; *Given's Case*, 34 N. J. Eq. 191. And it has been decided that in such proceeding against an executor to discover assets of the estate, the executor is not competent as a witness as to business occurrences between himself and the testator, his father, out of which the alleged withholding of assets arose: *Tygard v. Falor*, 163 Mo. 234, 63 S. W. 672.

IX. Petition or Affidavit.

In a special statutory proceeding brought by an executor or administrator to discover property of the decedent withheld from the petitioner the allegations on the part of the latter may be exclusively upon information and belief, and without disclosing the sources or grounds thereof, as the only prerequisite to the issuing of the citation is the satisfaction of the probate court that there are reasonable grounds for the inquiry: *Walsh v. Downs*, 3 Dem. Sur. 202. But all of the executors or administrators must join in the petition, and be made parties to the proceeding, else the petition and citation must be dismissed upon motion of the person cited for examination: *Matter of Shingerland*, 36 Hun, 575. If, however, such person appears and goes to trial upon the merits, he thereby waives any defects in the affidavit or petition by which the proceeding is commenced. Objection to the affidavit or petition must be urged before submitting to the jurisdiction of the court: *Wade v. Pritchard*, 69 Ill. 279.

An administrator has a right to file an amended affidavit in such proceeding, and thereafter the proceedings under the original affidavit will be considered as abandoned, and it will be presumed that the proceeding was conducted under the amended affidavit, but the whole record may be examined on appeal to ascertain whether the subsequent steps and orders were taken under the amended or under the original affidavit: *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969.

X. Limitation of Action.

A judge of probate has statutory power to call before him and examine, under oath, as well the executor or administrator of an estate when suspected and charged with concealment or embezzlement or wrongfully withholding the property of the estate, as any other person who is interested with such property by the executor or admin-

istrator, and so charged, and, while such proceedings can only result in a discovery of the facts, to serve as a basis of ulterior proceedings, yet the lapse of thirty years since the transaction inquired into is no bar to such examination: *O'Dee v. McCrate*, 7 Me. 467.

ALBRIGHT v. BANGS.

[72 Kan. 435, 83 Pac. 1030.]

EXECUTORS AND ADMINISTRATORS—Foreign Administrator De Bonis Non—Sale of Real Estate by—Validity.—If a non-resident dies testate in one state owning property in another, and executors named in his will are appointed and qualify as such in the former state, and letters testamentary are issued afterward to the same persons in the other state, an administrator de bonis non, who is appointed in the former state on account of the death of one executor and the removal of the other, is not thereby made the successor in trust of the executors under their appointment in the other state, so as to enable the courts of that state to permit him to sell lands of the estate to pay its debts under an order previously granted to the executors, without giving a new notice of his application for such authority. A sale by him without such notice is void, and a deed under such sale constitutes no defense to an action of ejectment by the devisees or their successors in interest. (p. 220.)

G. H. Buckman and O. P. Fuller, for the plaintiffs in error.

Hackney & Lafferty, for the defendants in error.

⁴³⁶ MASON, J. Soranus L. Bretton died testate in Illinois in 1881. The will was duly probated in the county court of Rock Island county, Illinois, and the two persons whom it named as executors were appointed and qualified as such. These executors then represented to the probate court of Cowley county, Kansas, that at the time of his death the testator owned certain real and personal property in that county, and asked that the will be there admitted to probate, and that they be granted letters testamentary that they might proceed in the management of the part of the estate found in Kansas. An order was made admitting the will to record upon the strength of its having been approved by the Illinois court, and letters testamentary were granted to the executors, who gave the bond and took the oath required by the Kansas statute and en-

tered upon the performance of their duties in this state. In 1883 they filed in the Cowley county probate court a petition for leave to sell real estate situated in that county for the payment of debts. Notice of a hearing thereon was properly given, and an order was made authorizing the executors to sell certain tracts of land for that purpose at private sale. A number of tracts were accordingly sold, the sales were confirmed, and deeds were executed. On June 3, 1886, the court ordered that no more of the real estate should be sold until a reappraisement should be made and until the court should direct further proceedings under the order of sale already made.

For more than twelve years nothing further was done to subject the real estate remaining unsold to the payment of debts. On August 30, 1898, Burton F. Peek made a showing in the probate court of Cowley county that the Illinois court having jurisdiction of the Bretton estate had appointed him administrator de bonis non with the will annexed, on account of one ⁴³⁷ executor's having died and the other's having refused to act and being disqualified by nonresidence in Illinois. He asked the Kansas court to make an order recognizing him as such administrator, with authority to sell real estate in the manner prescribed by law. An order was accordingly made recognizing him as such administrator, confirming his appointment by the Illinois court, and approving the bond which had been there given.

This administrator then presented an application to the Cowley county probate court representing that an indebtedness against the estate remained unpaid, reciting that the order of sale made fifteen years before was still in force, and asking that appraisers be appointed to appraise enough real estate to satisfy such debt. Appraisers were named, appraisements were had, a tract of land was sold, the sale was confirmed, a deed was ordered and executed, and purchaser went into possession. Thereafter several conveyances of the property were made, the last grantees being Grant Stafford and P. H. Albright. In 1902 an action was brought by the Bretton devisees against Stafford and Albright for the recovery of the possession of this land, under the claim that the administrator's sale was absolutely

void and passed no title. They recovered a judgment, from which the defendants prosecute error.

The administrator, Peek, gave no notice of the hearing of the petition presented by him for an order authorizing the sale of real estate, and the sale was obviously void on this account unless the proceedings taken by him can be regarded as a continuation of those begun by the executors. They were manifestly so considered by him, and so treated by the probate court. The only question that need be determined here is whether the two proceedings were so connected that the jurisdiction to authorize sales of real estate acquired by the probate court in virtue of the notice given by the executors remained with the court ⁴³⁸ so as to warrant the making of an order, without further notice, for the administrator to sell lands covered by the original notice and order.

It is not doubted that an order made upon due notice for the sale of real estate by an executor or administrator is sufficient to authorize a sale by his successor in trust (18 Cyc. 726, 758), but the vital inquiry here is whether for this purpose Peek, the administrator de bonis non, was the successor of the executors who gave the notice and to whom the original order of sale was granted. In the investigation of this question it is necessary to observe carefully the different steps that were taken and the statutory provisions by which they were respectively authorized. In this connection it is first to be noted that there are two separate and distinct methods under our statute by which real property in this state may be sold to satisfy the debts of a nonresident testator. One of them is that provided in sections 7962 to 7965, inclusive, of the General Statutes of 1901. Under this method, when a will has been duly proved in another state, upon the production by the executor or other interested person of an authenticated copy of the will and probate thereof the probate court of any county in this state in which there is property upon which the will may operate may admit it to record: Gen. Stats. 1901, sec. 7963. Section 7965 reads: "After allowing and admitting to record a will pursuant to the four preceding sections of this act, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and may proceed in the settlement of the estate

that may be found in this state; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real and personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed shall or may have by law."

It will be noticed that the section quoted contemplates the actual appointment by a Kansas court of ⁴³⁹ an executor or administrator who shall be subject to the control of that court in all things.

The other method referred to is described in sections 2950 and 2951 of the General Statutes of 1901. Section 2950 reads as follows: "When an executor or administrator shall be appointed in any other state, territory or foreign country on the estate of any person dying out of the state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased; after which he may be authorized under an order of the court to sell real estate for the payment of debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, except as hereinafter provided."

Section 1951 provides that if the bond already given by the foreign executor or administrator be found sufficient, he shall not be required to give any further security; that otherwise he must give an undertaking properly to account for the proceeds of all sales he may make, according to the laws of the state in which he was appointed. It is to be noticed that these sections do not contemplate the appointment of a Kansas executor or administrator or any appointment in Kansas whatever; they merely relate to the recognition, for the purpose of effecting the sale of real estate situated in Kansas, of an appointment made elsewhere.

In the present case the executors proceeded under the first stated of these two methods. They did not ask that the Kansas court should authorize them to sell real estate in virtue of their having qualified as executors in Illinois.

They were appointed as executors for Kansas, amenable to the Kansas courts and the Kansas laws in all things, and they gave bond and took their oaths as Kansas executors. The circumstance that they had already been appointed executors ⁴⁴⁰ in Illinois is a mere incident. It was not essential to their appointment in Kansas. Indeed, it would appear that, since the statutes of Illinois and of Kansas alike forbid the appointment of a nonresident executor, no one could properly qualify as an executor in both states.

On the other hand, the administrator proceeded under the second method. He did not seek to be, nor was he, appointed as a Kansas administrator. He merely asked to have the appointment that had already been made in Illinois recognized by the Kansas court, so that he might as an Illinois administrator sell Kansas real estate under the supervision of a Kansas court.

As appears by section 2950, *supra*, this could be done only upon the theory that no executor or administrator had been appointed in Kansas. Executors had been appointed in Kansas. One of them died. The other, although removed by the Illinois court because he was not a resident of Illinois, may have been still qualified to act in Kansas, so far as the record discloses. In order for the Cowley county probate court to have had jurisdiction to permit the foreign administrator to sell Kansas real estate the executors already appointed must have been disposed of in some way. Perhaps to sustain the acts of the court it may be assumed that the surviving executor had been removed by the Kansas court as well as by that of Illinois, and that the situation therefore became the same, so far as related to sales of real estate by a foreign administrator, as though no executor or administrator had been appointed in Kansas. In that view of the matter the administrator *de bonis non*, in virtue of his appointment in Illinois, might have been authorized to sell real estate in Kansas "in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." But to procure an order for that purpose it was essential that he should give notice. He could not avail himself of the notice given by the executors ⁴⁴¹ fifteen years before, for he was not their successor in this matter—he did not succeed them in the capacity in

which they had acted in giving the notice and obtaining the order of sale. He may have been, and doubtless was, the successor of the executors so far as related to their appointment and qualification in Illinois, but he was not their successor in respect to their appointment and qualification in Kansas. The notice they gave and the order they procured from the Kansas court were solely in virtue of their appointment in Kansas, and, although they chanced to be the same persons to whom letters testamentary had already been issued in Illinois, it does not follow that the person appointed to succeed them there acquired the authority to complete their acts begun in their capacity as Kansas appointees.

The administrator's deed was therefore void, and constituted no defense to the action of ejectment brought by the owners of the land. The judgment is affirmed.

All the justices concurring.

On Administrators De Bonis Non, see the note to *Morrow v. Fidelity and Deposit Co.*, 108 Am. St. Rep. 413.

STATE v. MONAHAN.

[72 Kan. 492, 84 Pac. 130.]

CONSTITUTIONAL LAW—Elections—Property Qualifications of Officers.—A constitutional provision that no property qualification shall be required for any office of public trust, or for any vote at any election, applies only to elections and offices provided for in such constitution, and has no application to elections held in, or officers chosen for a public corporation created by statute, such as a drainage district, whose directors may be required to be freeholders elected by resident taxpayers. (p. 226.)

CONSTITUTIONAL LAW—Elections—Property Qualifications of Officers.—The elections held to choose officers of a drainage district or to pass upon the expediency of proposed improvements designed for protection against floods are not merely other elections than those provided for in the constitution; they are of a different character from any therein referred to, and so far dissimilar in their nature that it cannot be inferred that they were within the contemplation of the constitutional convention when the qualifications of electors were under consideration by that body. (p. 232.)

CONSTITUTIONAL LAW—Property Qualifications of Officers of Drainage Districts.—A statutory requirement that the directors of a drainage district shall be freeholders is not in contravention of a constitutional limitation forbidding a property qualification for any office of public trust. (p. 233.)

C. C. Coleman, attorney general, and J. S. Gibson, county attorney, for the state.

W. R. Smith, Pratt, Dana & Black and Waggener, Doster & Orr, of counsel.

S. W. Moore and F. H. Wood, amici curiae.

Keplinger & Trickett, for the defendants.

⁴⁹² MASON, J. The Kansas legislature at its last session enacted a law (Laws 1905, c. 215) permitting the creation of public corporations known as drainage districts, having power to take certain measures for the protection of property within their boundaries against injury from the overflow of natural watercourses; this power to be exercised by a board of directors, chosen by the resident taxpayers, who are authorized to call elections to vote upon propositions to issue bonds to meet the cost of any improvements undertaken. This action is brought in the name of the state, upon the relation of the county attorney, against the persons selected as the first directors of such a drainage district, which has been organized in Wyandotte ⁴⁹³ county, to oust them from the exercise of the duties attached by the statute to their office, upon the ground that the act referred to is wholly void because it conflicts with the Kansas constitution. The case is submitted on a demurrer to the petition.

The provisions of the act which are claimed to be in conflict with the fundamental law of the state are those prescribing the qualifications of directors and electors of the district. Section 13 provides: "At all elections and meetings held under the provisions of this act, only persons twenty-one years of age who are taxpayers and residents of the district, regardless of sex, shall be entitled to vote."

Substantially the same language is also found in section 9. Section 8 reads: "That all powers granted to drainage districts incorporated under the provisions of this act shall be exercised by a board of directors consisting of five persons, who shall be freeholders and actual residents of the district, who shall hold their offices for three years and until their successors are elected and qualified, and who shall be chosen at the time and in the manner hereinafter specified."

Section 7 of the Bill of Rights includes this restriction: "No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election": Gen. Stats. 1901, sec. 89.

In behalf of the plaintiff it is asserted that the statute, in requiring directors of the district to be freeholders, and voters to be taxpayers, attempts to impose a property qualification for an office of public trust, and for a vote at an election, within the letter and spirit of the constitutional limitation quoted. The defendants maintain: 1. That the words "election" and "office," as here used in the constitution, relate only to elections and offices provided for in that instrument, and have no application to elections held in, or officers chosen for, a public corporation created by statute, such as a drainage district; 2. That, even if ⁴⁹⁴ the provisions attacked are invalid, they may be disregarded without impairing the effect of the remainder of the act. As the court agrees with the defendants in their first contention, it will not be necessary to consider the second.

The question whether it is competent for the legislature to confine to taxpayers the right of voting at such elections as are provided by this act must be answered in the affirmative, upon the authority of *Wheeler v. Brady*, 15 Kan. 26. In that case this court upheld a statute giving women the right to participate in the election of school district officers, notwithstanding the constitution in granting the general right of suffrage to male citizens only by necessary implication excluded females from its exercise. The decision was based upon the principle that the constitutional expressions concerning the privilege of voting were intended to apply only to those elections provided for by the constitution itself. In the opinion it was said: "There is no school district election or meeting provided for in the constitution; there is no provision as to how school district officers shall be elected, appointed, or chosen; and we suppose no one will claim that they are, by the terms of the constitution, to be elected at either of the elections provided for in the constitution; hence it would seem that the legislature would have full and complete power in the matter; that the legislature might provide for the election or appointment of school district officers as it should choose,

when it should choose, in the manner it should choose, and by whom it should choose": Page 32.

The soundness of this decision is questioned by counsel for the plaintiff, who allege that it is out of harmony with the view prevailing elsewhere. It has, however, been frequently cited with approval in other jurisdictions: See *State v. Comes*, 15 Neb. 444, 19 N. W. 682; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; *State v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124; *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, ⁴⁹⁵ 39 L. R. A. 768; *State v. Board of Elections of City of Columbus*, 9 Ohio C. C. 134.

The cases of *Matter of Gage*, 141 N. Y. 112, 35 N. E. 1094, 25 L. R. A. 781, *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131, and *Coffin v. Election Commrs.*, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662, turned upon different aspects of the question, but cited the Kansas case with approval, and in distinguishing it emphasized the force of the reasoning by which it was sustained.

While the following cases did not in terms refer to *Wheeler v. Brady*, 15 Kan. 26, they involved substantially the same question and decided it in the same way: *Buckner v. Gordon*, 81 Ky. 665; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24; *Mayor etc. v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947; *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674, 34 L. R. A. 55; *Spitzer v. Village of Fulton*, 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957; *Leflore County v. State*, 70 Miss. 769, 12 South. 904.

It is true that there are cases which announce a contrary doctrine, but they are neither of so large a number nor of such cogency of reasoning as to shake the authority of the Kansas decision: See *St. Joseph etc. R. R. Co. v. Buchanan Co. Court*, 39 Mo. 485; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *Black v. Trower*, 79 Va. 123; *Allison v. Blake*, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480.

The present case cannot be distinguished from the earlier one upon the ground that here the limitation invoked is express, while there it was merely implied, or upon the ground that here the right of suffrage is restricted, while there it was enlarged. It is universally held that the enumeration in a state constitution of the classes of citizens who shall be permitted to vote is to be taken as to all matters

within the purview of the provision as a complete and final test of the right to the exercise of that privilege, and that the legislature ⁴⁹⁶ can neither take from nor add to the qualifications there set out: 15 Cyc. 281, 282, 298; 10 Am. & Eng. Ency. of Law, 573, 576, 577. The case of *Wheeler v. Brady*, 15 Kan. 26, was not decided upon the theory that the legislature might extend to women the right to vote for school officers because the constitution did not forbid such enlargement of the voting privilege there granted. On the contrary, the court assumed that the constitutional provision defining qualified electors as male persons of stated attributes operated to bar females from the exercise of the right there referred to as completely as though there had been an express prohibition to that effect, and that the legislature could no more enlarge any right of suffrage conferred by the constitution than it could restrict it. The determination reached was, therefore, necessarily based upon the doctrine that the constitutional rules concerning the right to vote have application only to such elections as are provided for in the constitution itself.

Nor can the present case be withdrawn from the operation of this doctrine by reason of the broad and unqualified language of the prohibition relied upon by plaintiff: "No . . . property qualification shall be required . . . for any vote at any election." Manifestly it is not necessary to construe this literally as applying to every election whatsoever. It doubtless would not be contended that the sentence relates to the election of the officers of a private corporation, although that is a matter over which the legislature exercises some control: Gen. Stats. 1901, sec. 1288. It would be superfluous to cite instances in which general language of this character has been given a restricted meaning. A typical example is presented in *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183, where the requirement that no banking law shall be in force until submitted to a popular vote is held to apply only to banks of issue: See, also, *Fischer v. Moore*, 69 Kan. 191, 76 Pac. 403. A reasonable interpretation ⁴⁹⁷ of the clause here in question seems to confine its application to those elections provided for or referred to in other parts of the constitution. This is in accordance with the view taken of equivalent expressions in cases already cited. In *Hanna v. Young*, 84 Md. 179.

57 Am. St. Rep. 396, 35 Atl. 674, 34 L. R. A. 55, the section of the Maryland constitution under consideration was as follows: "All elections shall be by ballot; and every male citizen of the United States, of the age of twenty-one years or upward, who has been a resident of the state for one year, and of the legislative district of Baltimore city, or of the county in which he may offer to vote, for six months next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections hereafter to be held in this state."

Of this section it was said in the opinion: "It is contended on the part of the appellant that this section of the constitution plainly comprehends and includes within its express terms all elections, whether state or federal, county or municipal. Yet there is but one municipality mentioned in this section of the organic law, and in fact Baltimore City is the only municipality mentioned eo nomine in any part of the constitution. . . . Whilst the constitution (art. 3, sec. 48) authorizes and empowers the general assembly to create corporations for municipal purposes, it nowhere prohibits the legislature from imposing upon the qualified voters residing within the corporate limits of a town any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the selection of its officers. In this respect the power of the legislature is unlimited. The argument advanced at the hearing in this court is to the effect that the act in question is void because the constitution has conferred the right and prescribed the qualifications of all electors in this state, [and] the legislature is without authority to change or add to them in any manner. If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the constitution (art. 3, sec. 48) only in general terms authorizes ⁴⁹⁸ the creation of corporations for municipal purposes, and leaves to the legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation, or which may be regarded as beneficial in the government of the same. The constitution of this state provides for the creation of certain offices, state and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that

municipal elections held within the state (outside the corporate limits of Baltimore City) can be properly termed elections under the constitution, such as state and county elections; or that the framers of the constitution ever contemplated that article 1, section 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. . . . It is only at elections which the constitution itself requires to be held, or which the legislature under the mandate of the constitution makes provision for, that persons having the qualifications set forth in said section 1, article 1, are by the constitution of the state declared to be qualified electors": Pages 182, 183.

The case of *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24, involved the construction of a section of the Michigan constitution reading as follows: "In all elections every male citizen; every male inhabitant residing in the state on the twenty-fourth day of June, 1835; that every male inhabitant residing in the state on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the state two years and six months, and declared his intention as aforesaid; and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe—shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector or entitled to vote at any election unless he shall be above the age of twenty-one years, and has resided in this state three months, and in the township or ward in which he offers to vote ten days, next preceding such election."

⁴⁹⁹ The court said: "While it must be conceded that no person can vote for the election of any officer mentioned in the constitution unless he possesses the qualifications of an elector prescribed by that instrument, it does not follow that none but such electors can vote for officers which the legislature has the right to provide for, to carry out the educational purpose declared in that instrument": Page 11.

In *Mayor etc. v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 937, the court, in interpreting a constitutional provision that certain persons should be entitled to vote "at

all elections," said: "It is manifest that some restriction must be placed upon the phrase 'all elections,' as used in section 1, else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with affairs of others in which he has no interest or concern. In our opinion the word 'elections,' thus used, does not have its general or comprehensive signification, including all acts of voting, choice, or selection, without limitation, but is used in a more restricted political sense—as elections of public officers."

In *Spitzer v. Village of Fulton*, 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957, the court said of a provision of the constitution giving citizens having certain qualifications the right to vote "for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people": "The contention of the plaintiffs is that the provisions of chapter 269 contain a restriction upon the provisions of article 2 as to the right to vote for elective officers and upon all questions which may be submitted to the vote of the people, and, hence, are violative of its provisions. The obvious purpose of that article was to prescribe the general qualifications that voters throughout the state were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs. But we are of the opinion that that article was not intended to define the qualifications of voters upon questions relating to the financial interests or ⁵⁰⁰ private affairs of the various cities or incorporated villages of the state, especially when, as in this case, it relates to borrowing money or contracting debts": Page 289.

The Mississippi legislature enacted a stock law which was to become effective in each county upon being approved at a local election, to be participated in by voters having qualifications entirely different from those prescribed for electors by the constitution. The statute was attacked upon the ground that it sought to establish a property qualification for voting and to extend the right of suffrage to persons barred from its exercise by the constitution. In *Leflore County v. State*, 70 Miss. 769, 12 South. 904, the court said: "The provisions of the constitution as to qualified

electors, and registering electors, and the election ordinance adopted by the constitutional convention, have been appealed to as rendering unconstitutional the provisions of the code as to a stock law. We reject this view. There is nothing in the constitution or ordinances at war with the stock law. The legislature might pass a stock law for one or all the counties without a vote of the people on the subject. It might empower each board of supervisors to declare such law in force, without vote or petition of the people, and, having plenary power over the subject, was authorized to prescribe the conditions on which the boards might act": Page 778.

The elections referred to in the act under consideration were not provided for by the constitution, nor did the constitution impose upon the legislature any duty to make provision for them. They were not required to be held by reason of anything contained in the fundamental law of the state. The drainage district in question is wholly the creation of the legislature, which had practically unlimited discretion in the matter. The statute might have made the office of director appointive instead of elective, and might have made the issuance of bonds dependent upon the will of the taxpayers as indicated by petition instead of by vote. That the ⁵⁰¹ selection of the officers who act for the corporation is decided by the usual electoral machinery, but by a restricted electorate, and that the concurrence of the taxpayers in a bonding proposition is expressed by means of an election, rather than by some other method, do not bring the case within the reason or within the true meaning of the clause of the constitution relied upon by the plaintiff. The elections held to choose officers of a drainage district or to pass upon the expediency of proposed improvements designed for protection against floods are not merely other elections than those provided for in the constitution; they are of a different character from any therein referred to, and so far dissimilar in their nature that it cannot be supposed that they were within the contemplation of the constitutional convention when the qualifications of electors were under consideration by that body.

It practically follows from the views already announced that the requirement that the directors of the district shall be freeholders is not in contravention of the constitutional

limitation forbidding a property qualification for any office of public trust. The words "office of public trust" are equivalent to "public office": *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62; *Conley v. State*, 46 Neb. 187, 64 N. W. 708. The director of a drainage district is in a sense a public officer, but as his office is not one provided for by the constitution, nor even one of the same general character as any that are referred to in that instrument, it must be deemed not to be within the scope of the prohibition. The reasons for giving to the broad expression "any election" a restricted meaning apply with almost or quite equal force to the corresponding one—"any office of public trust." As the two phrases are used in the same sentence and in the same connection, it would hardly be reasonable to enforce the restriction in the one case and not in the other.

The demurrer to the petition is sustained.

All the justices concurring.

A Statute Limiting the Right of Suffrage as to the business and financial affairs of villages to the taxpayers of the municipality does not violate the article of the constitution defining the general qualifications of the electors of the state: *Spitzer v. Fulton*, 172 N. Y. 285, 92 Am. St. Rep. 736. For other authorities on this question, see *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396; *Mayor v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208.

MCALLISTER v. FAIR.

[72 Kan. 533, 84 Pac. 112.]

DESCENT AND DISTRIBUTION—Inheritance by Murderer.—If the statute of descents provides in clear and unambiguous terms that a husband shall inherit from his wife dying intestate, and makes no exception on account of crime on his part, the courts cannot, upon considerations of public policy, so interpret the statute as to exclude from the inheritance one who murders his wife for the purpose of acquiring her property. (p. 235.)

DESCENT AND DISTRIBUTION—Right of Criminal to Inherit.—If the statute of descents contains no exception on account of crime by one entitled to inherit under its terms, the courts can add none. (p. 239.)

R. W. Turner, for the plaintiffs in error.

W. S. Canan, W. R. Mitchell and S. H. Allen, for the defendants in error.

⁵³³ JOHNSTON, C. J. This was a proceeding begun in the probate court to obtain a distribution of the estate of Kate Brandt. She was killed by her husband on March 14, 1903, for the purpose of obtaining her property, and in a prosecution for the offense he was convicted of murder in the first degree and is now imprisoned in the penitentiary under a death sentence. She had no children, and under ordinary and normal circumstances her husband would inherit her estate. She left a personal estate said to be worth about one thousand dollars, and the husband assigned and transferred his interest in it to G. A. Bailey, the attorney who defended him against the criminal charge. Her brothers and sisters, the nearest blood relatives living, claimed the estate, alleging that the husband's crime disabled him from taking any interest in it. In the probate court, and also in the district court, to which the case was appealed, ⁵³⁴ it was held that the husband was the only heir of his deceased wife; that her estate descended to him; and that Bailey was entitled to it under the assignment.

The plaintiffs complain, and insist that a murderer should not be permitted to inherit the estate of his victim. The descent and devolution of property is regulated by statute. Section 2521 of the General Statutes of 1901 provides: "If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leave no wife nor issue, the whole of his estate shall go to his parents." Section 2529 provides: "All the provisions hereinbefore made in relation to the widow of a deceased husband shall be applicable to the husband of a deceased wife. Each is entitled to the same rights or portion in the estate of the other, and like interests shall in the same manner descend to their respective heirs." Section 2532 provides that "the personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of according to law, shall be distributed to the same persons and in the same proportions as though it were real estate." It is conceded that the statute is general and inclusive in its terms, but it is said to be inconceivable that the legislature intended to give an estate to a husband who murdered his wife to obtain it. It is argued that the letter of a statute should not prevail over its sense and spirit, and that a literal interpretation of the statute in question would in effect be giving property

as a reward for crime. It is said that the legislature is presumed to have enacted the statute in question having in view the maxims of the common law that no man shall take advantage of his own wrong, or acquire property by his own crime, or use the law to accomplish his unlawful purposes, and, therefore, that the courts are justified in imputing a different intention to the legislature and excepting murderers from the operation of the statute.

These considerations would have great weight if ⁵³⁵ there were ambiguity in the statute, or if it were the province of the court to settle the policy of the state with respect to the descent of property or as to the character and extent of punishment which should be inflicted for the commission of crime. That anyone should be given property as the result of his crime is abhorrent to the mind of every right-thinking person, and is a strong reason why the lawmakers, in fixing the rules of inheritance and prescribing punishment for felonious homicide, should provide that no person shall inherit property from one whose life he has feloniously taken. A statute of this character has been enacted in at least one state: Iowa Code, 1897, sec. 3386; *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151. The horror and repulsion caused by such an atrocity, however, do not warrant the court in reading into a plain statutory provision an exception which the statute itself in no way suggests. If the statute were of doubtful meaning and open to two constructions, there might be room to infer that the legislature intended the one which would be most reasonable and just in its application. As will be observed, however, the rule of inheritance is explicit, and the statute contains no hint that anyone is to be excluded on account of misconduct or crime.

In *Ayers v. Commissioners of Trego Co.*, 37 Kan. 240, 15 Pac. 229, the court was asked to read into a statute a meaning which its words did not import, and the reply was made: "We have not the right to change the statute where it is clear and free from ambiguity, by any judicial interpretation." In the recent case of *Atchison etc. Ry. Co. v. Atchison Grain Co.*, 68 Kan. 585, 75 Pac. 1051, it was held that the fraud and misconduct of one party which prevented another from bringing an action did not create an implied exception to the statute of limitations; that, the

legislature having made no exception on that ground, none could be made by the courts; that it was the duty of the courts to administer the law regardless of particular cases of hardship; that the ⁵³⁶ function of changing a law because it works unjustly or oppressively belongs to the legislature, and for a court to ingraft an exception upon a statute would be judicial legislation.

The argument that a literal interpretation of the statute would in effect encourage crime and contravene public policy is no reason why the courts should disregard a plain statutory provision, nor would it justify them in determining the policy of the state upon the question. The right to determine what is the best policy for the people is in the legislature, and courts cannot assume that they have a wisdom superior to that of the legislature and proceed to inject into a statute a clause which, in their opinion, would be more in consonance with good morals or better accomplish justice than the rule declared by the legislature. It has been said that "the well-considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent": *Deem v. Millikin*, 6 Ohio C. C. 357.

The statute makes nearness of relationship to the decedent, and not the character or conduct of the heir, the controlling factor as to the right of inheritance. Besides, the penalties for felonious homicides are definitely prescribed in another statute, and the loss of the inheritable quality or the forfeiture of an estate is not among them. If the court should hold that the loss of heirship and the forfeiture of an estate were a consequence of Brandt's crime, it would have to ignore the legislative rule governing the descent of property, and would, in effect, impose a punishment for his crime in addition to that prescribed by the only body authorized to declare penalties for violations of law. Nor is it easy to attribute to the legislature an intention to take from a criminal the right to inherit as a consequence of his crime, since the constitution provides that no conviction shall work a corruption of blood or ⁵³⁷ forfeiture of estate: Bill of Rights, sec. 12; Gen. Stats. 1901, sec. 94.

The cases relied on by plaintiffs in error as authorities against the right to inherit are those involving insurance

policies, wills, and the like: *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, 22 N. E. 188, 5 L. R. A. 340; *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540; *Lundy v. Lundy*, 24 Can. S. C. 650; *New York Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. ed. 997; *Schmidt v. Northern L. Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800, 51 L. R. A. 141; *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

There is a manifest difference, however, between private grants, conveyances and contracts of individuals and a public act of the legislature. It might be that a person would not be permitted to avail himself of the benefits of an insurance policy the maturity of which had been accelerated by his felonious act. Many considerations of an equitable nature might affect the operation or enforcement of a grant or contract of a private person which would have no application or bearing on a statute enacted by the legislature. So far as the descent of property is concerned, the courts are practically unanimous in holding that all the power and responsibility rest with the legislature. They have spoken with one voice in opposition to the exclusion of an heir from taking an estate on account of crime, where the statute in plain terms designates him as one entitled to inherit.

In *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, the court had under consideration the question whether a wife who had been convicted of being accessory to the killing of her husband was disabled from taking the share of the estate left by the deceased which the statute gave to her. It was said: "We are unable to find any sufficient legal grounds for denying to the petitioner the relief which she demands; and it belongs to the law-making power alone ⁵³⁸ to prescribe additional grounds for the forfeiture of the right, which the law itself gives, to a surviving wife.

"Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle": Page 242.

In *Carpenter's Estate*, 170 Pa. 203, 50 Am. St. Rep. 765, 32 Atl. 637, 29 L. R. A. 145, it was held that a son who murdered his father for the purpose of securing the father's estate was entitled to take the estate under the intestate

laws, and that his crime did not destroy his right of inheritance. Among other things the court remarked: "The legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence. . . . The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. . . . It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children in the absence of a will, how can any doctrine, or principle, or other thing called public policy, take away the estate of a child and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory, and the estate cannot be diverted from those persons and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute": Page 208.

In *Deem v. Millikin*, 6 ⁵³⁹ Ohio C. C. 357, it was held that "the statute of descents provides in clear terms that where one dies intestate and seised in fee of lands, they shall descend and pass to the children of such intestate; and the courts cannot, upon considerations of policy, so interpret the statute as to exclude from the inheritance one who murders such intestate": Syllabus. This decision was affirmed by the supreme court of Ohio upon the reasons given by the circuit court: *Deem v. Millikin*, 53 Ohio St. 668, 44 N. E. 1134.

In *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 939, 25 L. R. A. 564, the supreme court of Nebraska first held that one who killed an ancestor could not share in an estate (*Shellenberger v. Ransom*, 31 Neb. 61, 28 Am. St. Rep. 500, 47 N. W. 700, 10 L. R. A. 810), but upon a re-

hearing and a fuller consideration the court changed its position and declared that where the statute of descents contains no exception on account of crime the courts can add none. In determining the question the court, at page 643, quoted approvingly from *Bosley v. Mattingly*, 53 Ky. (14 B. Mon.) 89, as follows: "When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action."

In meeting the suggestion that to allow a person to gain property by intentional homicide is shocking to the senses, and that the legislature would necessarily have shared in a feeling of abhorrence against such a rule if they had given it attention when the act was passed, the court remarked: "This is no justification to this court for assuming to supply legislation, the necessity for which has been suggested by subsequent events, but which did not occur to the minds of those legislators by whom our statute of descent was framed. Neither the limitations of the civil law nor the promptings of humanity can be read into a statute from which, without question, they are absent, no matter how desirable the result to be attained may be": Page 644.

⁵⁴⁰ In the case of *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151, it was contended that public policy forbids a party from deriving advantage from a criminal act, but the answer made by the supreme court of Iowa was: "The public policy of a state is the law of that state as found in its constitution, its statutory enactments, and its judicial records: *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257, 42 L. R. A. 490. And when such policy touching a particular subject has been declared by statute, as in this case, it is limited by such statute, and the courts have no authority to say that the legislature should have made it of wider application": Page 453.

In *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458, which is cited as an authority against the husband's right to inherit, there was a contest over the proceeds of an insurance policy, and, while it was held that the husband who feloniously killed his wife was incapacitated to take her choses in action, it was determined upon the rules of the common law, and not upon a statute of descents. The

majority of the court recognized that the weight of authority, as well as the better legal reasoning, supported the view that an unqualified statute casting descent should be given effect, and in the opinion it was said: "For it may be true that it would be a stretch of judicial authority to hold that an unambiguous statute providing a line of devolution of property should be interpreted to mean that this line was to be broken upon the felonious homicide of the ancestor or testator by the one next in succession": Page 407.

The court then proceeded to determine that no statute existed in the state governing the devolution of property in such cases, and based its judgment on common-law principles entirely: See, also, 41 Cent. L. J. 377.

Although a theory cutting a murderer out of any benefits resulting from his crime appeals to the court's sense of justice, it cannot be overlooked that the legislature has the power to declare a rule of descents; it ⁵⁴¹ has done so in language that is plain and peremptory, and no rule of interpretation would justify the court in reading into the statute an exception or clause disinheriting those guilty of crime.

The judgment of the district court is affirmed.

All the justices concurring.

The Principal Case has the support of *Carpenter's Estate*, 170 Pa. 203, 50 Am. St. Rep. 765. However, it is held that a beneficiary in a life insurance policy payable to him, his heirs, or legal representatives, who murders the insured, forfeits his rights under the policy, and neither he, his assigns, nor his children as heirs can recover thereon during his lifetime: *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

COSTIGAN v. TRUESDELL.

[119 Ky. 70, 83 S. W. 98.]

JUDICIAL SALE.—**Mere Inadequacy of Price** is not sufficient to set aside a sale of a decedent's real estate to pay debts. (p. 242.)

JUDICIAL SALE.—**Setting Aside After Confirmation.**—Except upon the grounds stated in section 518 of the Civil Code practice, a court is without power to set aside a sale of a decedent's real estate to pay debts after its confirmation. (p. 242.)

JUDICIAL SALE.—**Parties.**—A Sale of a Decedent's real estate to pay debts in an action for the settlement of the estate will not be set aside because a person who claims to be a creditor, but who has not established his claim, was not made a party to the proceedings. (p. 243.)

JUDICIAL SALE.—**Where the Sale of an Equity of Redemption** is ordered to pay a decedent's debts, the fact that the order of sale is not executed does not prevent the termination of the statutory right to redeem. (p. 243.)

JUDICIAL SALE.—**Rents.**—If a Purchaser of a Decedent's Realty, sold to pay a mortgage and other indebtedness, takes possession before the expiration of the time for redemption, he becomes liable to the owners for the rents. They are not assets of the estate, but a claim in favor of the husband and heirs of the decedent. (p. 243.)

JUDICIAL SALE.—**Right of Possession.**—The Owners of a decedent's estate, sold to pay a mortgage and other indebtedness, are entitled to possession until a receiver is appointed or the period of exemption expires. (p. 243.)

Louis Reuscher and C. L. Raison, for the appellant.

George Washington, Ramsey Washington and Edward A. Bruton, for the appellant.

73 PAYNTER, J. This action was instituted to settle the estate of Anna W. Covington, and there being but little personal property, it was necessary to sell real estate. A

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building association held a mortgage on the real estate, and there were some other creditors, including Costigan, who did not have a lien upon it. The court ordered it sold to satisfy the debts, and it was sold for that purpose on February 4, 1903, and it was purchased at the commissioner's sale by the appellee Truesdell at less than two-thirds of its appraised value. On February 14, 1903, the sale was confirmed. The proceeds of the sale only paid the mortgage creditor and costs of the suit, leaving the demands of the other creditors unsatisfied. On March 28, 1903, the court ordered the equity of redemption sold, but for some reason not appearing in the record that order was never executed. In November, 1903, W. G. Wagenlander filed a petition asking to be made a party to the action, claiming he had a debt of thirty dollars against the estate secured by mortgage on the real estate. He seems to have abandoned his claim, as he took no further steps to enforce it, and he is not here complaining, so the questions here for review are not affected by the alleged claim of Wagenlander. On February 2, 1904, two days before the time for the redemption of the land expired, the appellant Costigan filed what is denominated as an answer and cross-petition, by which he sought to set aside the sale to Truesdell, claiming the land had been sold for a grossly inadequate price. After the expiration of the time for redemption, ⁷⁴ Costigan filed an amended answer and cross-petition, in which he avers that, if the property is resold, he would pay five hundred and fifty dollars for it.

This court has repeatedly held that a mere inadequacy of price is not sufficient to set aside a sale. If it had been a good ground for setting aside the sale, the question was raised too late, as the sale had been confirmed months before. Except upon the grounds stated in section 518 of the Civil Code Prac., the court was without power to set aside the sale after it had been confirmed: *Thompson v. Brownlie*, 25 Ky. Law Rep. 622, 76 S. W. 172; *Carpenter v. Strother's Heirs*, 16 B. Mon. 289; *Yocum v. Foreman*, 14 Bush, 494; *Megowan v. Pennebaker*, 3 Met. 501; *Dawson v. Litsey*, 10 Bush, 408; *Kincaid v. Tutt*, 88 Ky. 392, 10 Ky. Law Rep. 1006, 11 S. W. 297; *Bean etc. v. Hoffendorfer*, 84 Ky. 685, 8 Ky. Law Rep. 739, 2 S. W. 556, 3 S. W. 138. The fact that Wagenlander was not made a party does not al-

ter the case: *Thompson v. Brownlie*, 25 Ky. Law Rep. 622, 76 S. W. 172. Besides, he did not establish his claim. It may not have existed in law. After the sale to Truesdell, the equity of redemption could have been sold, and the court so ordered. It was not sold, and the failure to execute the order could not prevent the termination of the statutory right to redeem. It only existed for one year after the sale, and during that time there was not even an offer to redeem: *Bethel v. Smith*, 83 Ky. 84. It is averred in the amended answer that Truesdell took possession of the property after his purchase, and that the value of the rents was twelve dollars per month. If he did so before the expiration of the time for redemption, he is liable to the owners for the rents. That question cannot be determined in this action, because the court did not place the property in the hands of its receiver, and the owners were⁷⁵ entitled to enjoy the use of the property until the court did so, or until the time for redemption expired. The rents were not assets of the estate, but a claim in favor of husband and heirs at law of the decedent. The appellant Costigan slept on his rights, and thus failed to collect his claim.

The judgment is affirmed.

A Judicial Sale will not be set aside, as a rule, for mere inadequacy of price alone: *George v. Norwood*, 77 Ark. 216, 113 Am. St. Rep. 143; *Koch v. West*, 118 Iowa, 468, 96 Am. St. Rep. 394; *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223; *Stroup v. Raymond*, 183 Pa. 279, 63 Am. St. Rep. 758.

CRABTREE v. DAWSON.

[119 Ky. 148, 83 S. W. 557.]

TORTS—Unintentional Injury.—No one is liable, civilly or criminally, for an unintentional consequential injury which results from a lawful act, where neither negligence nor folly can be imputed to him; and the burden of proving negligence or folly, where the act is lawful, is always upon the plaintiff. In other words, the foundation of the defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making a mistake which an ordinarily prudent man would exercise under the same or similar circumstances. (p. 249.)

ASSAULT on Innocent Person Supposed to be an Assailant.—If a person, while apprehensive of an attack from A, strikes B, when he has reasonable grounds to believe that B is A, and when he further

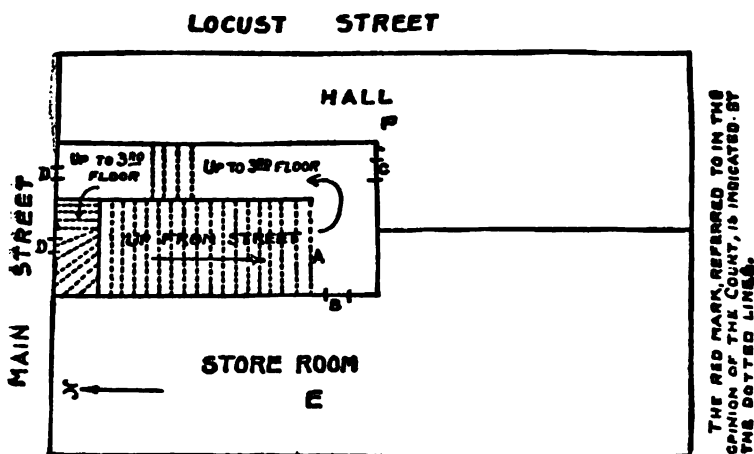
believes that it is necessary, in the exercise of a reasonable judgment, to strike A in order to defend himself from a threatened attack by A, using no more force than is necessary, or appears necessary to him, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it is his duty to exercise the highest degree of care practicable under the circumstances to ascertain whether the one whom he is about to strike is in fact the one from whom he apprehends danger; it is not enough that he exercises "due" or "ordinary care and diligence." And if he recklessly and wantonly strikes B, he is liable in exemplary as well as compensatory damages. (p. 252.)

ASSAULT—Whether Excusable.—An instruction in an action for assault and battery is objectionable, if it specifically calls the attention of the jury in detail to the facts testified to by the defendant, and relied on to excuse his conduct. (p. 253.)

J. D. Atchison and Laurence P. Tanner, for the appellant.

Wilfred Carrico and La Vega Clements, for the appellee.

¹⁵⁰ BURNAM, C. J. This action for assault and battery instituted by appellant, Roy Crabtree, against the appellee, John T. Dawson, grew out of the following facts: Appellee Dawson owns a three-story building on the corner of Main and Locust streets, in Owensboro, Kentucky. The room on the first floor is used as a business house. The second floor is divided by a partition, the room on one side being used for private entertainments. The third floor is a large hall, which was rented by appellee for dancing and public entertainments. The following diagram of the second floor will give a fair understanding of the location of the parties and place at the time of the assault:



A is Dawson at the head of the stairs when he struck Crabtree. The red mark* is the stairway leading from the store to the landing of the second floor. B is a door entering ¹⁵¹ the storeroom from the landing, which is about six feet wide, and which Dawson opened to get the musket with which he struck appellant. C is a door opening into the entertainment hall on the second floor. D, D, are two windows looking from the second floor to the third floor. E is a storeroom on the second floor, and F is the hall on the second floor. On the night on which this accident occurred, Dawson had rented the large hall in the third story to Philip Dorn and Ed Riney to give what was known as a "pay dance" for the benefit of the young people of the city. On the same night the daughter of appellee and a number of friends were giving a social entertainment in the small hall on the second floor. While these two entertainments were in progress, one Noble, while intoxicated, gained admittance to the hall on the third floor, without having paid the customary charge for admittance. Riney, one of the lessees, approached him, and insisted that he should either pay or leave the hall. He at first refused, but finally Riney succeeded in enticing him out of the room into the hall, and then closing the door, leaving Noble on the outside. He became disorderly, thereby attracting the attention of Dawson, who approached him. Dawson's version of what took place after this is as follows: "Noble remarked that he was going back and clean out the whole thing, and I said, 'No, you won't friend.' He replied, 'I am doing no harm.' I told him he must go downstairs. He said that he would not. I replied, 'You will,' and took hold of him. He went down. I may have shoved him a little. He stopped in front of the door of the hall on the second floor, where he tried to go in. I pushed him by, and got down to the platform on the first floor, where he sat down. He then got up and said, 'If you will come down here, I will fix it with you.' I replied, 'I don't want to bother with you.' ¹⁵² This platform goes into my storeroom. And when I got up to the head of the steps, somebody remarked, 'He is getting some bricks.' I stepped into the door and got an old musket. Just then Crabtree came running rapidly up the steps from the store below. I believed it was Noble returning to attack

*The red mark is designated with dotted lines in the diagram.

me, and called out to him, 'Don't come up here'; but he paid no attention to me, and, when he got up within striking distance, supposing it was Noble, I struck him with the butt of the musket, when I discovered that I had made a mistake and hit the wrong man." It is also shown that the hall at this point was somewhat dimly lighted, and that after appellee discovered his mistake he took appellant to a drug-store, had his wounds dressed by a physician, and sent him home in a carriage, and that he went the next day to express his regret at the occurrence, and offered to pay his doctor's bill, for loss of time, and for a new suit of clothes, the one worn by appellant having been greatly injured. The testimony for plaintiff is to the effect that he was only seventeen years old; that he was on his way as a guest to the dance being given in the hall on the third floor; that, whilst he heard Dawson tell Noble not to come back at the time he pushed him out of the store, he did not hear anyone call to him not to come up; that, as a result of the blow, he was knocked to the bottom of the steps, and sustained serious injuries. The jury, on these facts and the instructions given by the court, returned a verdict for the defendant, and plaintiff has appealed.

The main ground for reversal is that the court did not properly instruct the jury. As the question is a somewhat novel one, we deem it best at this point to insert the instructions in full. They are as follows:

"1. The court instructs the jury that if they believe from the evidence that the defendant on the — day of November, 1903, did wrongfully, willfully, recklessly, or unlawfully assault, beat, bruise, or wound the plaintiff by striking him violently on the head with the butt of a heavy gun or musket, thereby inflicting a dangerous wound on his head, from the effect of which assault and wounding the plaintiff suffered physical and mental pain and anguish, and was damaged thereby, they should find for the plaintiff such a sum of money as will reasonably compensate for the physical and mental pain which he sustained as the proximate result of said assault, not exceeding the sum of five thousand dollars.

"2. The court further instructs the jury that if they believe from the evidence that the assault of the defendant on the plaintiff was willful and reckless, and the defendant did not believe, or have reasonable grounds to believe when

he made said assault, that the person he was assaulting was Ollie Noble, then they may find any sum as punitive damages in favor of the plaintiff, provided, however, all damages they may find for the plaintiff do not exceed in the aggregate the sum of five thousand dollars.

"3. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant as set out in the petition was unintentional, and they further believe that it was recklessly committed by the defendant, and that the defendant did not use ordinary care and diligence, considering all the circumstances, to discover who the person was that he was about to strike before he struck, then the law is for the plaintiff, and the jury should find for the plaintiff; and, if they find for the plaintiff, the measure of their finding should be such sum as will reasonably compensate the plaintiff for the physical and mental pain which he sustained as the proximate ¹⁵⁴ result of said striking or assault, not exceeding the sum of all as mentioned in instruction No. 1.

"4. The court further instructs the jury that if they believe from the evidence that the defendant believed, and had reasonable ground to believe, that the person whom he struck was Ollie Noble, and said Noble had been on the premises of the defendant immediately before said assault, and had been ordered to leave defendant's premises, and had threatened to return and assault the defendant or his guests, and the defendant believed, and had reasonable grounds to believe, that when the plaintiff was coming up his stairway that it was Ollie Noble, and that it was necessary to strike the plaintiff in order to defend himself and his guests from the threatened attack upon him and his guests, and the defendant used due care and diligence, considering all the circumstances and facts surrounding him, and his connection with said Noble, immediately before said time, and unintentionally struck the plaintiff, mistaking the plaintiff for the said Noble, then the law is for the defendant, and the jury should so find.

"5. The court further instructs the jury that if they believe from the evidence that at the time the defendant assaulted the plaintiff he had just previously thereto had a difficulty with one Noble, and he had ordered said Noble to leave the premises, and took him out of his house, and that

said Noble threatened to immediately return to the defendant's house, and threatened to assault the defendant, and immediately thereafter he did see the plaintiff coming up the plaintiff's stairway on his premises, and, after exercising due care to ascertain whether or not it was Noble, did believe the plaintiff to be said Noble, and defendant was in the exercise of reasonable care for his own safety and protection of his property and guests, and in his own house, ¹⁵⁵ and was also reasonably careful and exercised due care to discover whether the person he was about to strike or assault was, or not, the said Noble, and they further believe that before striking the plaintiff he ordered the plaintiff to leave defendant's premises, and the plaintiff did not do so, or offer to leave, and the defendant believed at the time he struck the person he was about to strike Ollie Noble, that he was then in danger of great bodily harm or death at the hands of the said Noble, and that it was necessary to strike him in order to protect his guests, property, family, or himself, from the threatened assault, and he had used no more force than was reasonably necessary to protect himself, his guests, or his property, from said assault, then the law is for the defendant, and the jury should so find, except they believe from the evidence that the defendant used more force and violence in striking than was necessary to eject the person from his premises, if he believed it to be Ollie Noble, or more force and violence than was necessary to protect his property, his guests, his family, and himself from the threatened assault of said Ollie Noble.

"6. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant was unintentional, and that the defendant was intending to strike one Ollie Noble, and that the defendant would not have struck the plaintiff, except for the plaintiff's own carelessness and negligence in coming up the stairway of the defendant, and they further believe that the plaintiff's own carelessness and negligence contributed to and brought about the damages now complained of, then the law is for the defendant, and the jury should so find.

"7. 'Due care,' as used in the foregoing instructions, is that degree of care that a prudent man would exercise under the same or similar circumstances.

¹⁵⁶ "8. The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant on the occasion mentioned in instruction No. 1 was willful or reckless, or that the defendant did not exercise due care in ascertaining whom he was about to strike, then the jury cannot consider mitigating circumstances, as against the actual damage that the plaintiff sustained by such striking, but can only consider the mitigating circumstances and the justification, if any, of the defendant, in so far as it affects the punitive damages sought to be recovered in this action."

Both the plaintiff and defendant excepted to all the instructions given by the court, and offered instructions covering their respective views of the law. Those offered by appellant were based upon the theory that he was, in any contingency, under the admitted facts of the case, entitled to compensatory damages for the injuries resulting from the assault and battery made upon him by the defendant. On the other hand, those offered by defendant are based upon the theory that if he believed, and had reasonable grounds to believe, at the time he struck plaintiff, that it was Ollie Noble whom he was striking, and that it appeared to him to be necessary in order to protect himself or guests from a threatened assault at the hands of Noble, he was excusable on the grounds of apparent necessity and self-defense. From a careful examination of the decisions of this court and those of other jurisdictions, we feel warranted in asserting that no one is liable, civilly or criminally, for an unintentional consequential injury which resulted from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving negligence or folly, where the act is lawful, is always upon the plaintiff. In other words, that the foundation of defendant's liability in all such cases ¹⁵⁷ is negligence, or the failure on his part to exercise that degree of care to avoid making a mistake which an ordinarily prudent man would exercise under the same or similar circumstances. A very full discussion of this class of cases is found in *Morris v. Platt*, 32 Conn. 75. As this is the oldest and best considered case on the subject to which our attention has been directed, we quote from it liberally as follows: "An accident is an event or occurrence which hap-

pens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning, or blown down by tempest, or in an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are inevitable or absolutely unavoidable, because affected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were unavoidable under the circumstances; and in the third class, those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably required of one doing such lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the exigency have been avoided. Thus, to illustrate: If A burn his own house, and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable. The accident belongs to the first class, and was strictly inevitable and absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge, and the fire ¹⁵⁸ should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable, under the circumstances, and belong to the second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and was so guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate." The learned writer goes on to say further: "The foundation of that liability in every case of accident, where it is the result of human agency, uninfluenced by the operations of nature, and the act is lawful, is really negligence. This is true of collisions between vessels on the water, or horses and vehicles and persons on land. . . . So, when a man in firing at a mark unintentionally wounds another, the injury is direct, and the form of ac-

tion is trespass; but the ground of liability is negligence in doing an unnecessary and avoidable, though lawful, act without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident."

In *Brown v. Kendall*, 6 Cush. 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a bystander, while raising a stick to strike and part two dogs which were fighting. Chief Justice Shaw, in his opinion in that case, held that the defendant was not liable, unless the act was done in the want of the exercise of due care adapted to the exigencies of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. In *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615, the action was for an assault and battery. It appeared that defendant ¹⁵⁹ and plaintiff's brother were in a conflict. When defendant struck plaintiff with a knife, supposing him to be the brother, plaintiff had in fact given no provocation. The jury found for the plaintiff, and assessed his damages. The court instructed for that plaintiff that it was no defense, so far as actual damages were concerned, that the defendant had been violently assaulted by a person other than plaintiff, or was then being assaulted by such person, or that he may have honestly believed he was striking the plaintiff's brother when he struck plaintiff, or that he may have honestly believed it was necessary for his self-defense to assault the plaintiff, if the jury found from the evidence that the plaintiff was not a party to such assault upon the defendant; that such evidence of mistake of fact or good intentions on the part of the defendant can only be considered by the jury as a defense against the infliction by the jury of vindictive damages, and not as a defense against such actual damages as the evidence showed plaintiff had suffered from such assault, or as naturally resulted from such assault." The instructions were disapproved of in the opinion of the supreme court, the court saying: "If a person, doing a lawful act in a lawful manner, with all due care and circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, if an injury happens, he shall be deemed

in fault, and mulcted in damages? It is said by appellee the rule is different in civil cases; that the motive, intent or design of the wrongdoer toward the plaintiff is not the criterion as to the form of remedy, for when the act occasioning the injury is unlawful, the intent of the wrongdoer is immaterial, but appellant here is no wrongdoer, as the ¹⁶⁰ jury have said by their special verdict." The judgment in the case was reversed.

In 1 Joyce on Damages, page 427, section 367, the author says: "Though an assault may be unintentional, yet if it is recklessly committed, the party guilty will be liable in damages therefor, and the injured party may recover such damages as are the natural and direct result of the act of violence, including mental and physical pain and suffering. But one who in the exercise of his right of self-defense inflicts an unintentional injury upon a third party is not responsible in damages therefor, as where a person was assaulted by another, and he struck a third person, mistaking him for the assailant." Roberson's Criminal Law and Procedure, in section 542, page 752, lays down the rule as follows: "This right of self-defense exists although the danger is not real, but apparent only. A person will not be held responsible, civilly or criminally, if he acts in self-defense from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger"; citing a number of Kentucky cases in support of the text.

When we apply the principles of law announced in these decisions to the case at hand, it follows that if the defendant, at the time he struck the plaintiff, believed and had reasonable grounds to believe, that he was Ollie Noble, and that he further believed that it was necessary, in the exercise of a reasonable judgment, to strike Noble, in order to defend himself from a threatened attack about to be made upon him by Noble, and that he used no more force than was necessary, or appeared to him to be necessary, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it was the duty of the defendant to have exercised the highest degree of care practicable under the circumstances to have ascertained whether the person whom ¹⁶¹ he was about to strike was in fact the one whom he believed him to be, and from whom he apprehended danger to

himself. And if he recklessly and wantonly struck plaintiff, he was entitled, in addition to compensatory damages, to exemplary damages as well.

Whilst the instructions given in the case by the trial court are based upon the proper theory, they are in several important respects technically erroneous. For instance, in the third instruction only "ordinary care and diligence" is required of the defendant in ascertaining whether the person he was about to strike was in fact the person from whom he anticipated injury. This is error. He should have been required to exercise the highest or utmost care practicable under the circumstances by which he was surrounded.

In the fourth and fifth instructions the words "due care and diligence" are used. While the word "due" is defined to be "that which is owed," or "that which one has a right to demand or claim," we think it hardly comes up to the requirements of this case.

Instruction No. 5 is also objectionable, in that it specifically calls the attention of the jury in detail to the facts testified to by the defendant, and relied on to excuse his conduct. This error has been frequently pointed out and condemned by this court.

The sixth instruction is based upon the plea of contributory negligence, and is, in our opinion, out of place in this case. There is not a particle of evidence to show contributory negligence on the part of the plaintiff. He was at the place and doing exactly what he had the right to do. The instruction should, therefore, have been omitted altogether.

For reasons indicated, the judgment is reversed, and cause remanded for a new trial not inconsistent with this opinion.

Petition for rehearing by appellee overruled.

The Law of Self-defense is discussed in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

Unintentional Homicides are considered in the note to *Johnson v. State*, 90 Am. St. Rep. 571.

Negligence is the Failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what such a person would not have done under those circumstances. This definition does not exclude the idea that one may act upon appearances: *McDonald v. International etc. Ry. Co.*, 86 Tex. 1, 40 Am. St. Rep. 803; *Harker v. Burlington etc. Ry. Co.*, 88 Iowa, 409, 45 Am. St. Rep. 242; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709; *Tully v. Philadelphia etc. R. R. Co.*, 2 Penn. (Del.) 537, 82 Am. St. Rep. 425.

LUDLOW LUMBER COMPANY v. KUHLING.

[119 Ky. 251, 83 S. W. 634.]

BUILDING CONTRACT—Acceptance as Waiver.—The owner of land on which he contracts to have a house erected may recover damages for defective construction, although he pays the contract price, takes possession, and does not discover the defect until eight months thereafter. (p. 256.)

Furber & Jackson, for the appellant.

W. A. Byrne, for the appellee.

²⁵² PAYNTER, J. The appellees owned a lot in Ludlow, and, desiring to have a brick house built upon it, they entered into a contract with T. Johnson and others, as partners doing business under the firm name of Ludlow Lumber Company, by which they, in consideration of two thousand one hundred dollars, agreed to furnish the material and labor, and erect the house according to the plans and specifications. It was completed in October, 1901, when it was turned over to the appellees under representations by the appellants that it had been completed according to the contract. The appellees lived in it until May, 1902, a period of eight months, when they awoke one morning and found the walls of the house badly cracked and out of ²⁵³ plumb; and it cost them several hundred dollars to repair the foundation and house. This action was brought against appellants to recover damages for the defective construction of the house. The defendants sought to avoid a recovery by showing that it had been completed according to the contract, and that the damages resulted from a cause other than defective construction. The verdict of the jury, which was sustained by the court, and upon which the judgment was rendered, allowed the plaintiffs three hundred and thirty-eight dollars and ninety-five cents.

There was a conflict in the testimony, but it was the province of the jury to reconcile it, and, having done so, this court must decline to disturb the finding of the jury upon the question of fact.

The principal reason urged for a reversal is that appellees accepted the house, and moved into and lived in it for eight months before discovering the alleged defect. Even if there had been a defect in the construction, and they had knowledge of it before moving into the house, that fact

would not prevent them from recovering for the breach of the contract. The law on this question is well stated in *Morford v. Mastin etc.*, 6 T. B. Mon. 609, 17 Am. Dec. 168, in which the court said: "We are unwilling to attach so much importance to the defendant's receiving the work. How could he reject it without abandoning his estate on which it was situated? It was already part of his freehold, and he received every part as it progressed. The court seems to have confounded the case of a building on an employer's premises with such jobs of work and labor as a tailor performs in making his garment, the cabinet-maker his furniture, or the painter his figures. In these latter cases it is admitted that much depends on the acceptance of the article made, and not objecting to it, and rescinding the contract so soon as the defect is discovered, and that ²⁵⁴ for a very good reason; because it is necessary to do justice to the mechanic by possessing him of the article out of which to make his money, instead of keeping both the article and the price. Hence *Starkie* (volume 3, page 1769), says: 'Notwithstanding the universality of the position that performance, when it is the consideration for the payment of the stipulated price, is a condition precedent, yet the conduct of the employer in adopting the contract, when, if he disputed the performance, he had it in his power to rescind it in toto by placing the parties in statu quo, affords, as against him, a conclusive presumption that the work has been properly executed, or, at all events, excludes the party acquiescing from making the objection. Instances to this effect have already been cited. The principle extends to all cases of executory contracts for works of art to be delivered in a complete state. The party receiving the work under a specific contract must abide by it or rescind it in toto.' But it is well known that such return and such rescinding of a contract is impracticable with regard to a building erected on an employer's own premises. He could not object to the work, and leave it on the hands of the workmen, without conveying away his estate; nor could the mechanic receive or sell it for his own indemnification. Hence the reception—that is, leaving it on his premises not demolished—or even living in it, could not, with any good reason, preclude the employer from making the objection on the trial, as the instruction given supposes." The case of *Escott v. White*, 10 Bush, 169, is to the same effect. The

legal principle announced by these cases was applied by the court in instructions, and, we think, properly so. However, counsel for appellant insists that the principle of the Morford case does not apply, because in that case the defect was discovered before taking possession ²⁵⁵ of the property and before all of the contract price was paid. The right to recover in that case was not based upon the fact that the defect was discovered before the owner took possession of the property, and because he protested that it was not completed according to the contract. If it was a fact that the house was defectively constructed when appellees paid the contract price and took possession of the property, a cause of action existed. They did not forfeit their claim against the appellant for damages, because they did not discover that appellant had not built the house according to contract. If the law is that such a discovery must be made in a reasonable time (it is not necessary here to decide that it must be done), the failure to make the discovery before eight months is not an unreasonable time. We are of the opinion that the jury's verdict fixes a proper amount of compensation for appellees; therefore they are not entitled to a reversal on the cross-appeal.

The judgment is affirmed on the original and cross-appeals.

ACCEPTANCE OF WORK AS A WAIVER OF IMPERFECT PERFORMANCE.

- I. Contract to Manufacture and Sell an Article of Personality, 256.**
- II. Contract to Furnish Machinery, 257.**
- III. Contract to Erect Structure on Land.**
 - a. Effect of Using or Paying for Building, 257.
 - b. Doctrine of Substantial Performance, 259.
 - c. Church Edifices, 261.
 - d. Public Buildings or Works, 261.
 - e. Building Materials, 262.
- IV. Contract to Construct Drains or Ditches, 262.**
- V. Contract to Dig Wells, 263.**
- VI. Effect of Knowledge of Nonperformance, 263.**
- VII. Effect of Necessity of Using Articles Contracted for, 263.**

I. Contract to Manufacture and Sell an Article of Personality.

An acceptance by the vendee of personal property, after an opportunity for inspection, in the absence of fraud, generally estops him from thereafter raising any objection as to visible defects, unless there is a warranty intended to survive acceptance: *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Talbot Paving Co. v. Gorman*, 103

Mich. 403, 61 N. W. 655, 27 L. R. A. 96; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349; *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288. Practically the same rule applies in case of an agreement for the manufacture and sale of an article of personalty. An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity for inspection, in the absence of fraud estops him from thereafter raising any objection as to visible defects and imperfections, whether discovered or not, unless the acceptance is accompanied by some warranty of quality intended to survive acceptance: *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702.

II. Contract to Furnish Machinery.

A company for which an electric light plant is constructed may waive its right to rescind for failure entirely to complete the plant, by accepting and making use of it before its completion: *Florence Gas etc. Co. v. Hanby*, 101 Ala. 15, 13 South. 343. But where a contract is violated by constructing defective machinery on the premises of a person who has contracted for a first class outfit and appliances, and he cannot reasonably do otherwise than to accept the situation and make the best use possible of the outfit, he does not thereby waive his right to damages: *Payne v. Amos Kent Brick etc. Co.*, 110 La. 750, 34 South. 763. Where one contracts to have a new boiler erected in his boiler-house, and the one which the contractor puts in is not of the capacity specified by the contract, use of the boiler after its construction and connection with the factory for which it is designed does not establish an acceptance thereof: *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.

III. Contract to Erect Structure on Land.

a. *Effect of Using or Paying for Building.*—If a contract is for work to be done on movable articles, acceptance is generally a waiver of any objections to the quality of the work. However, a contract to do work on real property, such as to erect a building thereon, stands on a very different basis than do contracts for doing work on a chattel, for the owner of the premises is necessarily called upon to take possession of the completed building or else be excluded from the full enjoyment of his estate. Hence it is that the mere fact that the owner enters into possession and uses a building which has been constructed for him does not ordinarily constitute a waiver of a non-compliance by the contractor with his contract in erecting the building. The occupancy and enjoyment of the structure by the owner does not necessarily preclude him from showing that the contractor's work has been improperly or defectively executed: *Mitchell v. Wisconsin Land Co.*, 3 Iowa, 209; *Kilbourne v. Jennings*, 40 Iowa, 473; *Monford v. Martin*, 22 Ky. (6 T. B. Mon.) 609, 17 Am. Dec. 168;

Stewart v. Fulton, 31 Mo. 59; *Yeates v. Ballentine*, 56 Mo. 530; *Fee-ney v. Bardsley*, 66 N. J. L. 239, 49 Atl. 443; *Anderson v. Todd*, 8 N. Dak. 158, 77 N. W. 599; *Faulkner v. Cornell*, 80 App. Div. 161, 80 N. Y. Supp. 526; *Hartup v. City of Pittsburgh*, 97 Pa. 107.

"Such a contract deals with a subject matter of a peculiar nature. When an agreement for the manufacture of a chattel out of materials furnished by the maker is not performed according to its terms, the remedy of the party for whom it is made seems perfect. And the rejection of the chattel, while completely protecting him, does no injustice to the maker, for it leaves in his hands the materials with which his labor has been united. But when, under a contract for building, labor and materials of the builder are put into an edifice immovably affixed to the lands of another, and the title to which goes with such lands, the right of rejection, while it may be said theoretically to exist, is difficult to enforce in practice without apparent injustice to one party or the other. If the building be wholly unlike that contracted for, the owner is put to the delay and expense of removing it from his land which it encumbers. If, as is more usual, the building is not so unlike that contracted for as to permit the owner to feel reasonably justified in removing it, or if he is driven by necessity to use the shelter of the building, and if by protest and rejection he may escape payment, yet if the building add anything to the value of the land, eventually he or his representatives become benefited thereby": *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373.

"The owner of the soil is always in possession. The builder has a right to enter only for the special purpose of performing his contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with his work. The owner, from the nature and necessity of the case, takes the benefit of part performance, and, therefore, by merely so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract, he cannot reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights": *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442, quoted with approval in *Franklin v. Schultz*, 23 Mont. 165, 57 Pac. 1037.

Where one accepts work done upon a house, by a builder, he does not thereby waive objections to any latent defects in the work which are not open to inspection at the time of acceptance: *Korf v. Lull*, 70 Ill. 420. And the payment of the contract price and the occupancy of the house by the owner is not such an acceptance of the work as to estop her from claiming damages for the failure of the builder to carry out his contract, she having no knowledge of building, having no notice of defects at the time, being a personal friend of the builder, and relying entirely upon him to properly construct the building: *Ekstrand v. Barth*, 41 Wash. 321, 83 Pac. 305.

Where, after the expiration of the time within which the contractor stipulated to complete the building, the owner enters into possession of the premises, as it is his right to do, he cannot be held to have waived all defects of which he knew, or could have known "by the exercise of ordinary care": *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734.

It will be noted that in the principal case the Kentucky court holds that the owner of land on which he contracts to have a house erected may recover damages for defective construction, although he pays the contract price, takes possession, and does not discover the defect until eight months thereafter: See, too, *Flannery v. Rohrmayer*, 46 Conn. 558, 33 Am. Rep. 36. "The mere occupancy of the building by the owner, while appropriate, is neither presumptive nor conclusive evidence of acceptance. The reason is obvious. The building belongs to the owner of the land on which it stands. . . . He cannot be appropriately said to take possession of the building, for he has not been out of possession of that which is thus affixed to his own land"; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373.

Where work has been done on the interior of a building, its continued use is not necessarily an acceptance, for the law is not so unreasonable as to require the owners to abandon the building in order to reject the work: *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

b. Doctrine of Substantial Performance.—Where a builder fails to comply with his contract in erecting a building, but the owner nevertheless accepts and uses it, the builder may, at least if he has acted in good faith and not departed widely from the terms of the contract, recover the reasonable value of the work: *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Schaefer v. Gildea*, 3 Colo. 15; *Blakeslee v. Holt*, 42 Conn. 226; *Estop v. Fenton*, 66 Ill. 467; *McClure v. Secrist*, 5 Ind. 31; *Becker v. Hecker*, 9 Ind. 497; *White v. Oliver*, 36 Me. 92; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Marsh v. Richards*, 29 Mo. 99; *Dutro v. Walter*, 31 Mo. 516; *Moffitt v. Glass*, 117 N. C. 142, 23 S. E. 104; *Goldsmith v. Hand*, 26 Ohio St. 101;

Harris County v. Campbell, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. 243; Jennings v. Willer (Tex. Civ. App.), 32 S. W. 24; Taylor v. Williams, 6 Wis. 363; Dermott v. Jones, 69 U. S. (2 Wall.) 1, 17 L. ed. 762.

"Where a special contract is made with the owner to erect a house or other buildings on his land, and the contractor unintentionally fails to fully perform it by reason of unimportant variations, while he cannot recover on the contract itself, he may recover under a count on an account annexed for the value of the labor and materials, less any deductions necessary to complete the work, but not to exceed the contract price. It is no bar to his recovery that there has not been a full performance. . . . The foundation for this rule, whether applied to an action at law or in a petition to enforce a lien, has been stated to be that the land owner should not be permitted to avail himself of the added value to his property thus furnished, without making just compensation": *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942. To the same effect are *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261; *White v. School District*, 159 Pa. 201, 28 Atl. 136.

We are not sure that all the authorities recognize so liberal a doctrine as that adopted in Massachusetts. In the leading case of *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373, Justice Magie declared that "when a contract for erecting a building has not been so performed that a recovery can be had upon the common counts for work and material furnished in the erection, it will be permitted only when the owner has accepted the building erected. The view that assumes acceptance from the mere fact that the edifice adds value to the land on which it stands, in my judgment unduly restrains the force of the contract of the parties, and deprives the owner of the right to reject an edifice not in substantial conformity with its terms. If thereby any apparent injustice seems done to the builder in retaining the materials put upon the property, it is the result of his own default, to which he must submit."

And in the later case of *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52, Justice Mitchell affirms: "The doctrine of 'substantial compliance' of building contracts does not apply where the omissions or departures from the contract are intentional, and so substantial as to be capable of remedy, and that an allowance out of the contract price could not give the owner essentially what he contracted for. To entitle a party to recover for a part performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substantial performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise

to pay for it. Hence, in the case of a building on land, which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land, and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the nonperformance of the special contract."

The case of *Anderson v. Todd*, 8 N. Dak. 158, 77 N. W. 599, is also a leading authority on this point. In writing the syllabus therein, Justice Young states: "To entitle a contractor to recover upon a building contract which has not been fully complied with by him, under the doctrine of substantial performance, it must appear, not only that he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions or deviations which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he contracted for. The mere fact of taking possession of the building does not of itself amount to an acceptance of the same by the owner as having been erected according to contract."

c. **Church Edifices.**—The doctrine of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided the deviation from the contract was not willful and the other party has availed himself of and been benefited by the labor and materials, has been applied in the case of the erection of church edifice where the builder by mistake made the ceiling lower, the windows shorter and narrower, and the seats of different dimensions than the specifications called for, but the owners took and retained possession of the building: *Pincher v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264. It has also been adjudged that the nonconformity of pews to the contract specifications cannot be urged to defeat a lien on the church edifice, where the trustees have themselves received and put the pews into the building, for the breach is thereby waived: *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 390. But where tiling is laid in a cathedral, at a variance with the terms of the contract, the continued use of the building by the owners does not of itself show an acceptance of the work: *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261.

d. **Public Buildings or Works.**—If a contractor does work on a public building, the subsequent use and occupancy of the building by the municipality does not necessarily show an acceptance of the work which is not performed in accordance with the specification of the contract: *MacKnight Flintic Stone Co. v. Mayor etc. of New York*, 43 N. Y. Supp. 139, 13 App. Div. 231. More especially is this true, where possession is taken through necessity, and with the under-

standing that it shall not prejudice the rights of the municipality or be construed as a waiver: *MacKnight Flintic Stone Co. v. Mayor etc. of New York*, 52 N. Y. Supp. 747; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142. Where a county makes a part payment of the amount due for the erection of a courthouse, after the time specified for its completion, though the building is still incomplete, and the county also authorizes the circuit court and the clerk of the court to use the building before its acceptance, this is not a waiver of the county's claim for liquidated damages under the contract because the building was not completed on time: *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059.

The rule that the owner of real property who has employed another to erect a structure on his land does not, by taking possession and appropriating the structure to the uses for which it was built, preclude himself from insisting that the builder has not properly performed his contract, is applied to a contract for the construction of a drydock for the United States in *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419, where Justice Wallace observes: "The results cannot be separated from the necessary consequences of ownership; and as he cannot, without prejudice to himself, reject them or refuse to retain them, the law does not imply any promise from his acceptance of them. This being so, it matters not whether at the time he is or is not aware of the defects."

a. **Building Materials.**—Where the owner or his representative has the right and opportunity to inspect and reject the materials before they go into his building, he will be deemed to have waived the use of materials which do not come up to the requirements of the specifications, if he permits them to be used when their defects are of such a nature as to be discoverable on inspection: *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372; *Ashland Lime etc. Co. v. Shores*, 105 Wis. 122, 81 N. W. 136. However, the mere use of finishing material in a building, without discovering latent defects therein, is not such an acceptance as to preclude showing that the material was not furnished according to agreement, on the defects appearing as season progresses: *Utah Lumber Co. v. James*, 25 Utah, 434, 71 Pac. 986.

IV. Contract to Construct Drains or Ditches.

Where a person who has contracted to construct a drain does not complete the work within the time limited therefor, and does not do all of it in strict accordance with the specifications, but the other party nevertheless accepts the work and thereby waives these objections, the contractor may sue on the contract, although the other party may set up by way of counterclaim the damages sustained by him: *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631. And where the person for whom a ditch is constructed accepts it with knowledge of the facts, uses it without objection, and subsequently

acknowledges his liability under the contract, he may be deemed to have waived a requirement that a full head of water should flow through the ditch for a certain time: *Flick v. Hahn's Peak etc. Min. Co.*, 16 Colo. App. 485, 66 Pac. 453. The levy of an assessment by a company on its members to pay for a ditch for which the company has contracted, does not of itself constitute an acceptance of the contractor's work: *Gilliam v. Brown*, 116 Cal. 454, 48 Pac. 486.

V. Contract to Dig Wells.

When one accepts a well as completed according to the contract for drilling, he will not ordinarily be heard to say in an action for the contract price that the contract was not performed: *Elwood Natural Gas etc. Co. v. Baker*, 13 Ind. App. 576, 41 N. E. 1063. If a person has agreed to construct a well, and is not entitled to recover the price on his special contract on account of his failure to show compliance with its terms on his part, nevertheless if he satisfies the jury that the owner has received and used the well without notifying him of any defect in the work until payment is demanded, he may recover, as on the common counts, for work and labor done: *Simpson v. Carolina Cent. R. R. Co.*, 112 N. C. 703, 16 S. E. 853.

VI. Effect of Knowledge of Nonperformance.

The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance. This rule has been applied to carpenter's work (*Trustees of Monroe Female University v. Broadfield*, 30 Ga. 1), to work on a wall (*Barker v. Nichols*, 3 Colo. App. 25, 31 Pac. 1024), and to work on a roof: *Dodge v. Minnesota etc. Roofing Co.*, 14 Minn. 49. But where work is accepted with knowledge that it has not been done according to the contract, or under such circumstances that knowledge of its imperfect performance may be imputed, the acceptance will generally be deemed a waiver of the defective performance: *Waters v. Harvey*, 3 Houst. (Del.) 441; *Robert Mitchell Furniture Co. v. Monarch (Ky.)*, 39 S. W. 823; *Adams v. Hill*, 16 Me. 215. It is generally conceded, however, that where a contract calls for the erection of a structure or building on real estate, the owner may take possession of the structure when completed without being held to have waived defects in the work, for which he has notice: *Stewart v. Fulton*, 31 Mo. 59; *Mohney v. Reed*, 40 Mo. App. 99; *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419. Contracts of this nature are peculiar in this respect, as is hereinafter pointed out.

VII. Effect of Necessity of Using Articles Contracted for.

It not infrequently happens that work is accepted with knowledge that it is not such as has been contracted for, because the acceptor, under the exigencies of the case, has no alternative. When

work is thus accepted under the pressure of necessity, the general rule that acceptance is a waiver of imperfect performance may be modified in favor of the acceptor. Thus, it has been held that where one contracts for stave bolts with which to operate his mill, the fact that he uses them, when he has relied upon them to keep his mill in operation and cannot reject them without great injury, does not preclude him from thereafter showing their bad quality: *Ketchum v. Wells*, 19 Wis. 25. See, too, *Andrews v. Eastman*, 41 Vt. 134, 98 Am. Dec. 570, where firewood of a quality different from that contracted for is used through necessity. Where a vendee of machinery uses it, notwithstanding it is not such as he has contracted for, or has not been furnished within the time agreed upon, his use thereof being necessary in order to carry on his business, he does not thereby waive the imperfect performance on the part of the vendor: *Payne v. Amos Kent Brick etc. Co.*, 110 La. 750, 34 South. 763; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25. The fact that one walks from necessity over a walk and steps from his door to the street does not show an acceptance of the contractor's work in constructing them: *Gwinnup v. Shies*, 161 Ind. 500, 69 N. E. 158.

PREWITT v. SECURITY MUTUAL LIFE INSURANCE COMPANY.

[119 Ky. 321, 83 S. W. 611, 84 S. W. 527.]

FOREIGN INSURANCE COMPANY—Revocation of License.—
A Statute providing that if a foreign insurance company, without the consent of the other party to any suit brought by or against it in a state court, removes the suit to a federal court, the insurance commissioner shall forthwith revoke its authority to do business in the state, does not offend the United States constitution. (p. 271.)

Pirtle, Trabue, Doolan & Cox, for the appellant.

William Marshall Bullitt, for the appellee.

Hazelrigg, Chenault & Hazelrigg, N. B. Hays, attorney general, and R. H. Prewitt, for the commissioner.

324 HOBSON, J. In the first of the above cases the Security Mutual Life Insurance Company filed its petition in equity, alleging that in the year 1900 it began business in Kentucky, having complied with the requirements of the statutes of the state applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of

the state of New York; that the commissioner then granted it permission to transact the business of life insurance in this state, and it employed a large number of agents, established a large number of agencies throughout the state, expended large sums of money in advertising its business, and acquired a large and profitable business in the state; that in June, 1904, it removed to the circuit court of the United States for the eastern district of Kentucky, without the consent of the other party, a suit brought against it in one of the circuit courts of the state; and that on September 29, 1904, the ³²⁵ defendant Prewitt, as insurance commissioner, revoked its authority to do business in the state for the sole reason that it had removed the suit referred to to the circuit court of the United States, and refused and still refuses to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the state. The defendant demurred to the petition, his demurrer was overruled, and he, declining to plead further, a judgment was entered as prayed in the petition.

In the other cases the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and unless enjoined by the court, will revoke it, to the plaintiff's irreparable injury, it being a foreign corporation created under the laws of the state of Connecticut. The defendant demurred to the petition, his demurrer was sustained, and the plaintiff declining to plead further, its petition was dismissed. Both the appeals raise the same question and will be considered together.

By section 633 of the Kentucky Statutes of 1903, licenses to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor and fined not less than fifty dollars nor more than one hundred dollars for each offense. By section 634 every foreign insurance company, before transacting any business in this state, must return to the commissioner a copy of its charter or organic law, and the commissioner, upon being satisfied that the company has complied with the laws of the state and is possessed with the legal reserve, shall furnish to such agents

as the company directs ³²⁶ a license to transact business as agents for the company, under the seal of the insurance department. By section 657 foreign life insurance companies, in addition, must file statements annually of their condition on the 31st of December of the year preceding and certain evidences of their deposits, securities, etc. By section 694 insurance companies other than life, not incorporated under the laws of this state, upon complying with the provisions of the statute, may be authorized by the commissioner to transact business in the state. By section 761, the fees to be charged by the commissioner are regulated.

Section 631 of the Kentucky Statutes of 1903 is in these words: "Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; but if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted ³²⁷ that it is in conflict with the constitution of the United States. Three decisions of the United States supreme court are relied on. In *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, the statute of the state required the foreign insurance company to sign an agreement not to remove any of its cases to the federal courts. The company signed the agreement and afterward filed a petition seeking the removal of a suit brought against it to the federal court. The state court refused to remove the case, but on appeal to the United States supreme court the judgment of the state court was re-

versed, and it was held that the agreement in advance not to exercise a right guaranteed by the constitution did not prevent the defendant from removing the case to the federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next case relied on is *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, the opinion being also written by Judge Hunt. In that case there was a state statute corresponding to section 631 above quoted, and the state officer under it was about to cancel the license of the insurance company. The plaintiff made in substance the same allegations as are made in the case before us, and prayed an injunction as in these cases. The supreme court, reversing the court below, dismissed the bill. After distinguishing the case from the *Morse* case (20 Wall. 445, 22 L. ed. 365), the court said: "The cases of *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, *Ducat v. Chicago*, 10 Wall. 410, 10 L. ed. 972, *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, ³²⁸ any terms, conditions and restrictions it may think proper that are not repugnant to the constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field (Curtis) in the case last named. The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable: *Rector v. Philadelphia*, 24 How. 300, 16 L. ed. 602; *People v. Roper*, 35 N. Y. 629; *People v. Commissioners of Texas*, 47 N. Y. 501. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect: *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204. License to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and constitution of the United States. Full power and control over its territories, its citizens, and its business belongs to the state. If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus the pleading before us alleges that the permission of the Continental Insur-

ance Company to transact its business in Wisconsin is about to be revoked for the reason that it removed the case of Drake from the state to the federal courts. If the act of an individual is within the terms of the law, whatever may be the reason which governs him or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. The state of Wisconsin (except so far as its connection with the constitution and laws of the United States alters its position) is a sovereign state, possessing all the powers of the most absolute government in the world. 329 The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the state is legal—is not in violation of the constitution or laws of the United states—it is quite out of the power of any court to inquire what was the intention of those who enacted the law. In all cases where the legislation of a state has been declared void, such legislation has been based upon an act or a fact which was itself illegal.” After discussing certain previous decisions, the court added: “It is said that we thus indirectly sanction what we condemn when presented directly, to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an ‘inexact statement.’ The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. That state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or constitution of the United States, by its exclusion from the state, is infringed; and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court.”

It is conceded by counsel that if this case is still authority, ³³⁰ these actions must fail. But it is insisted that in *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931, 30 L. ed. 915, this case was, in effect, overruled. In *Barron v. Burnside* there was a state statute requiring every foreign corporation to have a license before engaging in business in the state. The license, by the terms of the statute, was not to be issued except upon the application of the company by a resolution of the board of directors or stockholders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the federal courts. *Barron* was arrested under the statute for doing business for a foreign corporation without complying with the statute, and obtained a writ of habeas corpus, which was sustained by the United States supreme court. The court, after quoting the statute and discussing it at some length, said: "This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable." Then, after some further discussion of the statute, the court concludes with these words: "In view of these considerations, the case falls directly within the decision of this court in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365." It then proceeds, after showing what was decided in the *Morse* case, to discuss the *Doyle* case in these words: "The case of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, and was satisfied with it. In referring to the second conclusion in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, above recited, namely, that the statute of Wisconsin was repugnant to the constitution of the United States, and was illegal and void, the court said, in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits

into the federal courts, and had received a license to do business in the state. Afterward it removed into the federal court a suit brought against it in a state court of Wisconsin. The state authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been that, as the state had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, must be regarded as not in judgment."

We do not understand this to overrule the *Doyle* case (94 U. S. 535, 24 L. ed. 1481); for certainly, if the state cannot withdraw the license it has once granted, any court of competent jurisdiction may so decide. If the state statute withdrawing the license was unconstitutional³³² and void, the supreme court of the United States had the same power to declare the statute in that case unconstitutional as it had to declare the statute unconstitutional in *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931, 30 L. ed. 915. Our statute is not liable to the objections made to the statute in either the *Morse* case (120 Wall. 445, 22 L. ed. 365) or the *Barron* case (121 U. S. 186, 7 Sup. Ct. Rep. 931, 30 L. ed. 915). Under our statute the foreign insurance company is at liberty to remove its cause to the federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the state, for the protection of its citizens against unsafe insurance companies, should require them, before doing business in the state, to obtain a license from the insurance commissioner, and to furnish him such evidences of their solvency as will protect insurers in this state before he is authorized to grant them a license. The license which the state grants is purely a matter of grace, and, like any other license, may be revoked by the licensor at pleasure. The revocation of the license

interferes with no legal right of the licensee; for, when he takes it, he takes it subject to revocation. He cannot question the reason of the licensor for revoking the license, as the state may exclude foreign corporations from doing business in the state with or without reason. If I have license to cross my neighbor's lot, and he revokes it because I brought a suit against his son, I cannot enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me; for he had an absolute right to revoke the license, and the fact that he did it out of spite, or for a bad reason, is immaterial. The state, by her statutes above referred to, in effect, says to the foreign insurance companies: "I will ³³³ license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If, after you come, you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the federal courts, but the practical denial of justice that results, in a sparsely settled state like ours, if the case must be tried one hundred or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the vicinage. The state simply says to the foreign insurance companies: "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the state, on the day before these suits were filed, by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States circuit court, could these plaintiffs have complained? If not, how are they affected by the fact that the state acts by an executive officer, and not by a special statute? Certainly they cannot complain that the license of certain other companies was not revoked.

The case of *Commonwealth v. East Tennessee Coal Co.*, 97 Ky. 238, 17 Ky. Law Rep. 139, 30 S. W. 608, did not involve the revocation of a license granted by the state, but was in effect similar to *Barron v. Burnside*, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the state courts. The naked question presented

here is, May the state, without cause, revoke a license it has once granted? for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound, unless the whole doctrine that the state may grant or withhold ³³⁴ a license as it sees fit is to be abandoned. It is juggling with words to say that a state may at will prohibit foreign corporations from doing business in the state (*Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297), and yet that it may not at will withdraw a license which it has once granted to such corporations. It seems to us that the *Boyle* case rests on sound principles, and that the *Barron* case in no wise conflicts with it; for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the *Morse* case: 6 *Thompson on Corporations*, secs. 7466, 7467; 13 *Am. & Eng. Ency. of Law*, 867; *People v. Pavey*, 151 Ill. 101, 37 N. E. 691.

The judgment in the first case is therefore reversed, for further proceedings consistent herewith.

The judgment in the second case is affirmed.

Chief Justice Burnam and Justice Barker Dissented from the conclusion of the majority of the court, Justice Barker writing a dissenting opinion in which he reviewed and relied upon the following authorities: *Commonwealth v. East Tennessee Coal Co.*, 97 Ky. 238, 30 S. W. 608; *Commonwealth v. Jellico Coal Co.*, 97 Ky. 246, 30 S. W. 611; *Insurance Co. v. Morse*, 87 U. S. (20 Wall.) 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931, 30 L. ed. 915; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148.

A Foreign Corporation does business within the state, not by right, but by comity, and the state may, at pleasure, revoke the privilege granted by it to such corporation: *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449; *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 110 Am. St. Rep. 919.

JONES v. CRAWFORD.

[119 Ky. 554, 84 S. W. 568.]

HOMESTEAD—Loss by Marriage of Infant.—Under a statute providing that the unmarried infant children of a deceased homesteader shall be entitled to a joint occupancy of the homestead with his widow until the youngest arrives at full age, a daughter who marries during minority loses her homestead rights. (pp. 274, 275.)

W. B. Moody and W. O. Jackson, for the appellant.

Turner & Turner, for the appellee.

555 O'REAR, J. The question presented for decision by this appeal is whether a homestead right under the statute which had become vested in an infant daughter of the land owner is divested by her marriage during her minority. By statute (Ky. Stats. 1903, sec. 1702) there is exempted to the debtor with a family, who is a resident of this commonwealth, land occupied by him, not exceeding one thousand dollars in value, which cannot be subjected without his consent to sale for his debts. This right of homestead exemption belongs to the debtor who is a head of the family, and attaches to such of his real estate as may have been selected and is occupied by him for that purpose. Upon the death of such homesteader, by section 1707 of the Kentucky Statutes of 1903, it is provided: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until **556** the youngest child arrives at full age. But the termination of the widow's occupancy shall not affect the children." But for section 1707, upon the death of the homesteader his property would at once pass to his heirs at law or devisees, subject to the rights of creditors, without any right to the widow or minor children to occupy it, save as they might take as heirs at law or devisees, which would give minors no claim superior to or different from that of major heirs. It is competent for the legislature to remove from liability for debts such portion of the debtor's estate as may be needful to sustain his family. It tends to keep the family together, to keep them from want, and is in harmony with the public policy to encourage the maintenance of the instruction of the home. This policy, though varied in many of its features, is now a universal one in this country.

It would be incomplete, and fall short of its wise and humane purpose, did it not extend to the widow and infant children of the debtor after his death. Every reason that existed before upon which it could rest continues with increased force after the death of the debtor. This right or privilege of homestead exemption is a creature of the statute. Its beneficiaries can take only what the statute has given them, and upon the terms named in the act. The heirs at law have no title, during their ancestor's life, to his property. Upon his death they take simply what the law gives them, and subject to the terms imposed by law. There is no inherent natural right of inheritance. So, when the legislature created the privilege of homestead exemption in favor of a householder, and continued it after his death for certain members of his family, it was competent for the law-making body to select those members whose interests and whose relation to society were such as to bring them within the public policy treated of by the enactment, and who should, for these reasons, be favored ⁵⁵⁷ by the statute. It was likewise competent, and perhaps necessary, to provide in what contingencies the right so conferred might be lost or otherwise terminated. The widow, by abandonment of the homestead, and the children upon reaching majority, lose their rights in the homestead as a homestead. The unity of the family—of the one family—of the deceased owner is looked to. When the widow abandons the homestead—as by remarrying and removing permanently from it—she is no longer regarded by the law, for the purposes of the application of the benefits of this statute, as a member of that family. When an infant child reaches his majority, he, too, is no longer a member of the decedent's remaining "family," within the contemplation of the statute. If an infant child marries, it thereby becomes a member of another family—that of his or her own—a new family, the head of which would be entitled to his or her own homestead exemption as such head of a family. By marriage the infant does not bring the spouse into the old family as a member of it, in law.

Counsel for appellee argue that an infant is incapable of contracting or of waiving his or her legal rights by conduct; that, as appellee's right to occupy the homestead in this case had once attached, her subsequent marriage during her infancy could not waive that right, because she was then under

the disability of infancy. But it must be remembered that the disability of infancy, as discussed in law, is a status created by the law, and may be subject to limitations or exceptions by the lawmakers. The statute under investigation is an exception by legislation to the general rule of law regarding the disability of infants. Under it the infant's act whereby he is removed from the class who may claim the benefits of the statute is what was contemplated by the ⁵⁸⁸ legislature, and was made a condition concurrent to the enjoyment of the statutory privileges.

The judgment of the circuit court is reversed, and cause remanded for proceedings not inconsistent herewith.

If a Person has Acquired the Right to a Homestead exemption by the occupancy of land with his family, the loss of his family by death and marriage does not defeat such right: Davis v. Feltman Co., 112 Ky. 293, 99 Am. St. Rep. 289, and cases cited in the cross-reference note thereto.

CARPENTER v. CARPENTER'S TRUSTEE.

[119 Ky. 582, 84 S. W. 737.]

WILL—Extrinsic Evidence to Vary Trust.—Where a testator has directed the share of his son to be paid to a trustee, to be used for the benefit of the son, but not to be paid into his hands, extrinsic evidence is not admissible to show that the testator's reason for creating the trust was the incapacity of the son because of disease, that since the death of the testator the son has so far recovered his health as to be able to manage his estate, and that therefore its possession and control should be given to him. (p. 277.)

C. B. Larimore, H. W. Curle and C. B. Dowling, for the appellant.

D. A. McCandless, for the appellee.

⁵⁸⁸ **BARKER, J.** This action involves a construction of the following item of the will of John B. Carpenter, deceased: "(6) I direct the share of my son, E. A. Carpenter, to be paid into the hands of a trustee to be appointed by the Hart county court, to be used for his benefit and to keep him from want, but that it be not paid into his hands." The will of the father was admitted to probate, and the appellee, Truax Sturgeon, appointed trustee by the Hart county court. Afterward the cestui que trust instituted this action in the

Hart circuit court against his trustee, setting up in his petition the foregoing item from his father's will, and alleging substantially that for three or four years before his father's death he (plaintiff) had suffered greatly from paralysis, and was unable to labor for his support, and that his father, "probably thinking or believing that his mind was impaired or would become impaired by reason of the paralysis, which this plaintiff ⁵⁸⁴ denies, and which was a wrong conception, if it was conceived by his father that his [plaintiff's] mind was impaired or would become impaired by reason of the severe stroke of paralysis," placed his (plaintiff's) estate in trust, as shown in the foregoing item of the will; that since his father's death his health has so improved as to render him physically able to prudently manage and control his estate, which is now withheld from him by his trustee, Truax Sturgeon; and he prays that the trust be vacated, and the fund constituting it be turned over to his hands for management, etc. A general demurrer was interposed to this petition, which was sustained by the court, and the appellant declining to plead further, was dismissed.

This action is based upon the opinion of this court in the case of *Webster v. Bush*, 19 Ky. Law Rep. 565, 39 S. W. 411, 42 S. W. 1124, which involved the construction of a clause in a will in all respects similar in principle to that at bar, in which it was held that where a testator devised an estate in trust for his daughter, under the supposition that she was of feeble mind, the court was authorized, upon an allegation that the physical incapacity had ceased to exist, to try this question, and, if it was established by the evidence, to discharge the trust. In that case Judge DuRelle delivered a dissenting opinion, which contains an admirable exposition of the law, and from which we adopt the following: "With the wisdom or unwisdom of the clause above quoted from the will this court has nothing to do, except in so far as it might shed light on the intention of the testator if ambiguity existed. There was no ambiguity. The testator had the absolute and unconditional right to place upon the devise to his daughter the limitations which he imposed, and no court has a right to assign to him a motive for these limitations, and, by denying the existence of a reason for that ⁵⁸⁵ motive, create a new will for the testator. To adjudge that a court, in construing unambiguous language in a will, may surmise a reason in the testator's

mind for his clearly expressed intent, and then, upon evidence introduced by devisees denying the existence of that supposititious fact, proceed to set aside the plain expression of intent, is to nullify the statute of wills. No trust could then be so carefully guarded as not to be at the mercy of the imagination of the chancellor. There can be no doubt that this trust comes within the class which do not vest a legal estate in the cestui que trust, being a case 'where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform the duty or execute the power': Perry on Trusts, secs. 300-305; Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399, and note. It seems to be equally well settled that 'where the instrument is free from ambiguity, and there is no imperfection or inaccuracy in its language, the testator's intention is to be collected from the words used by him and parol evidence is not allowable for the purpose of adding to or explaining or subtracting from it, or to raise an argument in favor of any particular construction: Phillips on Evidence, 545; 8 Bingham, 244; Wigram on Ec. Evidence, 65. Extrinsic evidence of intention is inadmissible for the purpose of supplying a devise or any other material provision omitted by mistake, or to superadd any qualification to the terms used, or to evince a mistake in writing the instrument': Stephen v. Walker, 8 B. Mon. 600. It is not necessary here to inquire whether the evidence introduced would be sufficient to justify a discharge of the trust if the will had provided that it was to continue only until the daughter became competent to manage her estate. The proposition here stated is that, under the terms of the will as written, no evidence can be introduced ⁵⁸⁶ to show what the reason was for the devise to the trustee, and that that reason never existed or has ceased to exist. To do so is to superadd a qualification to the terms used, and by parol to import into the will an intention which is not there expressed: Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321. It is to show by evidence aliunde a different intent on the part of the testator in reference to the devise to Euphemia from that manifested by the language of the will. The rule was stated by Judge Simpson in Stephen v. Walker, 8 B. Mon. 600: 'The inquiry must be confined to the meaning of the words used, and hence all extrinsic evi-

dence tending to prove, not what the testator has expressed, but what he intended to express, is inadmissible.' "

The question involved in the case at bar is not to be confused with the principle that a dry or simple trust will be vacated by the chancellor upon the request of the cestui que trust. A dry or simple trust is one as to which the trustee has no duties to perform, and the cestui que trust has the entire management of the estate. It is a simple separation of the equitable and legal estates, which can be united at the option of the cestui que trust: *Woolley v. Preston*, 82 Ky. 415. Nor is it to be confounded with those trusts which are created upon a declared condition which has passed away; the reason ceasing, the trust also ceasing. Such, for instance, a trust established for the benefit of a married woman, and she becomes discovert. In that case the trust will cease to exist when the declared disability ceases: *Thomas v. Harkness*, 13 Bush, 23. The case at bar presents an active trust, where the trustee has the sole management and control of the estate, and the question involved is whether evidence aliunde can be introduced to establish for a testator a motive for his action when he has expressed ⁵⁸⁷ none in his will, and where his language is perfectly plain and unambiguous. This, we hold, cannot be done, and *Webster v. Bush* is no longer to be regarded as authority.

It seems to us a safer rule to leave intact this trust—the result of loving foresight reaching into the future to shield the object of its solicitude after the heart which it inspired has ceased to beat—than to subject it to the vicissitude of a judicial inquiry based upon the careless opinions of witnesses as to the sufficient restoration of the beneficiary's mind to warrant the nullification of the will of the donor.

The judgment dismissing the petition is affirmed.

Extrinsic Evidence to Explain Wills is discussed in the note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 279. It is well understood that extrinsic evidence is not admissible to aid the construction of a will, where, from the language alone, when applied to the facts and circumstances to which it relates, the meaning of the testator is clear: *Thompson v. Betts*, 74 Conn. 576, 92 Am. St. Rep. 235. Evidence as to the intention of the testator separate and apart from that conveyed by the language of the will is not admissible for the purpose of interpreting the instrument: *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. Rep. 675; *Bingel v. Voltz*, 142 Ill. 214, 34 Am. St. Rep. 64.

FIDELITY TRUST AND SAFETY VAULT COMPANY
v. LOUISVILLE BANKING COMPANY.

[119 Ky. 675, 58 S. W. 712.]

JUDGMENT—Effect of Reversal.—Where the claim of a mortgage creditor was adjudged a lien superior to that of attaching creditors upon property assigned for the benefit of creditors, and he, under order of court, withdrew the funds which the assignees had paid into court, and distributed them among his creditors, the creditors of the assigned estate, upon the reversal of the judgment which has been appealed from but not superseded, cannot compel his creditors to refund the money, but must look to him alone. (pp. 283, 284.)

John Roberts, Lane & Burnett, Kohn, Baird & Spindle
and C. B. Seymour, for the appellants.

Humphrey, Burnett & Humphrey, for the appellee.

677 GUFFY, J. In 1890 the Etheridge Manufacturing Company, a corporation, made an assignment to George Straeffer, as alleged, for the benefit of all its creditors. Afterward some, if not all, of these appellees instituted suit and obtained attachments which were properly levied, and also attacked the assignment as fraudulent and as made with the intent to delay and defraud creditors. Said assignee was also summoned as garnishee. N. N. Etheridge, one of the stockholders and officers of said corporation, asserted a mortgage lien upon the proceeds in the hands of said assignee for the sum of \$6,000, besides interest.

The court below sustained the attachments, and adjudged the assignment to be fraudulent, and set the same aside; but adjudged the mortgage claim of Etheridge to be a superior lien upon the fund which Straeffer had, under proper orders of the court, paid into court, said amount being more than \$20,000, and after said judgment the court below allowed by order said Etheridge, through his attorneys, Lane & Burnett, to withdraw the money adjudged to him, and within a few days, if not on the very day said order was made, the money **678** was so withdrawn. These judgments and orders and withdrawal of the money occurred in December, 1894.

After the rendition of the judgment and the said order and collection had been made, the creditors of the corporation prosecuted an appeal to the court of appeals, but these judgments were not superseded. On the 22d of October, 1897,

this court reversed the judgment of the lower court in so far as it allowed Etheridge any lien upon said fund prior or even equal to the lien of the attaching creditors. After the return of the cause to the circuit court these appellees obtained rules against the several appellants, requiring them to pay back the several sums of money received by them.

It appears from the responses and testimony in this case that after the withdrawal of said sum, which then amounted to \$6,900, that on the fourteenth day of December, 1894, Etheridge paid out \$2,500 thereof to the Fidelity Trust and Safety Vault Company on a mortgage debt of \$5,500 to Mrs. E. L. Lane, and afterward paid to said company \$540; that he paid to his attorneys, Lane & Burnett, the sum of \$690, which was their charge against him for services rendered him in these cases; that he paid to C. G. Hulsewede and C. B. Seymour, for services that they had rendered him, the sum of \$1,380, and to S. E. Roach, on a mortgage debt, \$250, and city and state taxes, \$615.46, and to the Mutual Life Insurance Company, for insurance on his life, \$295.32; and some other sums not necessary to mention.

The substance of the responses of the several appellants herein show that they received the various sums of money named therein in payment of debts due them from N. N. Etheridge; and it is claimed that Etheridge was authorized to withdraw the fund from the court, and the judgment adjudging the same to him was then valid, unreversed and had never been superseded.

⁶⁷⁹ The court below adjudged the responses insufficient, and made the several rules absolute, and from these judgments these several appeals are prosecuted, and, by agreement, are heard together. It is the contention of appellees that they had a lien upon the \$6,900 in question, and that the circuit court erroneously adjudged the money to Etheridge, but they contend that such judgment did not destroy or annul their several liens; and inasmuch as the court of appeals reversed the judgment, and adjudged that the lien of the attaching creditors was superior to that of Etheridge, that the lien in fact and in law existed on the fund all the time; hence they argue that these appellants having received that identical money, that they were in law bound to repay the same under and in accordance with the rules issued as aforesaid. The appellants insist that there was no lien upon the

fund; that it was simply a liability upon the part of the holder to pay the same under proper orders of the court; and it is further contended that inasmuch as Etheridge, under the judgment of the trial court in the original case, was adjudged the money and the same paid to him, and by him to these appellants as aforesaid, that they are under no legal obligation to refund the same, and that the attaching creditors must look alone to Etheridge. There is no claim by appellees that any effort was being made, or intention made known, that the creditors desired or intended to supersede the original judgment.

We have not been referred to any decision of this court that expressly decides the question herein presented. It is, however, a familiar rule of law that a purchaser of land under a judgment acquired a good title, although the judgment may afterward be reversed. It seems to be conceded that in cases where a person is garnished that if he pays the debt owing to the defendant, that the party receiving the ~~same~~ money cannot be held to account therefor; but all that the plaintiff can recover is a judgment against the garnishee. We do not think the case of *Hobson v. Hall*, 13 Ky. Law Rep. 109, 14 S. W. 958, sustains the contention of appellees. It will be seen in that case that the parties who purchased the attached tobacco had executed a forthcoming bond, which bound them to have the tobacco, or the value forthcoming subject to the order of the court, and although the attachment under which the tobacco had been seized was finally discharged, yet the plaintiff had been allowed to file additional grounds of attachment before the bond had been discharged or sureties released, and the latter attachment having been sustained, the court adjudged a lien in favor of the attaching creditor upon the tobacco in question.

If, instead of the \$6,900 being in money, there had been a contest between Etheridge and the other attaching creditors as to a lien upon personal property, for instance, horses and cattle, then in the custody of the court's receiver, and the court had denied any lien to the attaching creditor and adjudged the property to Etheridge, it would seem that he could sell it and pass good title thereto at any time while such judgment was in force.

In *Freeman on Executions*, volume 3, section 346, it is said: "Upon the reversal of a judgment, after a sale has

been made under execution to a stranger to the suit, the defendant must seek redress from the plaintiff. This redress was formerly obtained by a *scire facias quare restitutionem non*. This is still the remedy in some states in cases where the record does not show that the money realized from the sale had been paid to the plaintiff. Where the plaintiff has received the proceeds of the sale, the defendant may recover in an action for money had and received. If, however, the money, after being paid to plaintiff, is by him paid to a third ⁶⁸¹ person, it cannot be recovered from such person, though he was one of the plaintiff's attorneys."

In Rhorer on Judicial Sales, section 576, it is said: "Where the sale is to a third person and bona fide purchaser, and has been fully completed by confirmation, conveyance and payment, it will neither be avoided nor will it be set aside by reason of a subsequent reversal of the decree. This rule is so generally recognized as to scarcely require authorities to support it. In the language of the Illinois supreme court, "if the court has jurisdiction to render the judgment or to pronounce the decree—that is, if it has jurisdiction over the parties and the subject matter—then, upon principles of universal law, acts performed and rights acquired by third persons, under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal."

In the case of Langley v. Warner, 3 N. Y. 327, the court, in considering a case somewhat analogous to the case at bar, uses the following language: "The case then comes to this: The money in question, in the regular course of judicial proceedings, came to the hands of the defendant as the attorney of Walsh; and on the subsequent settlement between them the money was passed to the creditor, Walsh, on account of his indebtedness to the defendant. It was the same thing in effect as though the defendant had first paid over the money to Walsh, and the latter had then repaid it to the defendant in satisfaction of his debt. About two months afterward the judgment was reversed and restitution was awarded to the plaintiffs against Walsh. It was very proper that he should make restitution, for he had in effect received the money and applied it to the payment of his debt. The plaintiffs proceeded to execution against Walsh, in pursuance of the judgment for restitution; but ⁶⁸² failing in that, they

now seek to recover the amount from the defendant. I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected, just as perfect as it would have been if no certiorari had been issued. He had a right to do what he pleased with the money; and he made a very proper use of it by paying his debt. The plaintiffs have taken up the strange notion that because they were trying to get the judgment reversed Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing. I am not aware of any foundation for such doctrine. As Walsh had a good title to the money, he could, of course, give a good title to the defendant, or anyone else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous and would be reversed. The legal presumption was the other way—that the judgment was right and would be affirmed. But if the judgment had been known to be erroneous the pendency of the proceedings in error could not affect, in the least degree, the title of Walsh to the money. Nothing short of a reversal of the judgment could destroy or impair his right."

In *Bank of the United States v. Bank of Washington*, 6 Pet. 19, 8 L. ed. 305, the supreme court, in discussing similar questions to that under consideration, said: "But the answer to the argument is that no notice whatever could change the rights of the parties so as to make the Bank of the United States responsible to refund the money. When the money was paid there was a legal obligation on the part of the Bank of Washington to pay it; and a legal right on the part of Triplett and Neale to demand and receive it, or to enforce payment of it under the execution. And whatever ~~was~~ was done under that execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment there is all the

privity necessary to sustain and enforce such right; but as to strangers, there is no such privity; and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of the intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."

If the contention of appellees that they had a lien upon the specific \$6,900, which lien attached and continued with the money, it would seem that if these appellants had paid the money to some other party that appellees would hold such party responsible, and that any and all persons who received the money would incur a liability to be required to refund the same. Surely this cannot be the law. The duty of Etheridge to refund the money is not disputed. And it seems to us that these appellees must look alone to Etheridge for relief or restitution. It results from the foregoing that the trial court erred in making the several rules absolute.

⁶⁸⁴ The judgments appealed from are reversed and cause remanded, with directions to adjudge the several responses sufficient and for proceedings consistent herewith.

The Effect of the Reversal of a Judgment on appeal is considered in the note to Cowdery v. London etc. Bank, 96 Am. St. Rep. 124.

COMMONWEALTH v. BECKETT.

[119 Ky 817, 84 S. W. 758.]

FALSE PRETENSES—Use of Confederate Money.—Where one party to a horse trade agrees to pay the other seven and one-half dollars to boot, and accordingly, with intent to defraud, hands him a ten dollar Confederate bill, saying: "Give me two dollars and a half; here is a ten dollar bill," whereupon the other receives the bill, supposing it to be United States currency, and passes two dollars and a half back as change, the offense of obtaining money under false pretenses is committed, although the bill may not be calculated to deceive a person of ordinary prudence and discretion, for the law protects the unwary and even the "foolish." The bill must be calculated to deceive, according to the capacity of him to whom it is presented to detect its falsity under the circumstances; whether or not it is, is a question for the jury. (p. 288.)

FALSE PRETENSES.—If the Facts Recited in an Indictment for obtaining money under false pretenses show upon their face that they are capable of defrauding, and it is charged that the defendant by them did intentionally and wickedly defraud the prosecuting witness, it is unnecessary specifically to charge that they were capable of defrauding. (p. 288.)

Ed. Daum, commonwealth attorney, N. B. Hays, attorney general, and Loraine Mix, for the appellant.

⁸¹⁹ O'REAR, J. This appeal involves the sufficiency of an indictment against appellee, charging him with obtaining money and property under false pretenses: Ky. Stats. 1903, sec. 1208. A demurrer was sustained to the indictment. It is charged that appellee fraudulently, knowingly and with the wicked intent to deceive and defraud one William C. French, induced the latter to part with two dollars and fifty cents lawful money of the United States which belonged to said French, in exchange in part for a ten dollar bill of the Confederate States of America. The particulars of the transaction were set forth in the indictment, the substance of which is that appellee and said French swapped horses, it being agreed that appellee was to pay French seven dollars and fifty cents to boot. The horses were exchanged, ⁸²⁰ and appellee handed French a ten dollar Confederate bill, with the remark: "Give me two dollars and fifty cents; here is a ten dollar bill." French, believing it was a bill for ten dollars of lawful money—its appearance being quite similar to the treasury silver certificates for that sum—gave appellee the two dollars and fifty cents, and accepted the

Confederate bill as good money, without knowledge or suggestion that it was what it was. It is charged that appellee knew at the time that it was a Confederate bill, and intended by his words and conduct to deceive French into believing it was a bill of lawful currency, and did so deceive him. It is said that the indictment was held to be bad because there was no specific statement by appellee that the bill was United States currency.

The statute is (section 1208): "If any person by false pretenses, statement or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, . . . he shall be confined in the penitentiary for not less than one nor more than five years." It seems to be conceded that all the conditions of the statutes are satisfied except that of the false pretense, statement, or token. It is the deceit, falsely and fraudulently superinduced by a beneficiary, whereby the latter obtains money or property of value, that is sought to be repressed by the statute. When one intentionally creates a belief as to an existing fact which is false, and with the intent to defraud another of his property, and does so, it cannot matter whether the erroneous belief was induced by words or acts, or both. The mischief may be done as effectually by one method as by another. Some words, by their common employment, may imply other words not spoken. A proposition to sell an article for ten dollars, without designating the currency in which the price is to be paid, in this country implies that the seller ⁸²¹ is to get lawful money or currency of the United States of America. When the buyer agrees to pay the price, and offers a bill in payment purporting to be a bill of the currency of the circulating medium of the country, it is implied that he thereby represents that it is of that currency, if nothing to the contrary is stated. This amounts to an assertion or representation by conduct, which may be as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. Signs might be used instead. Conduct that conveys necessarily the same idea, and intended to do so, is but a substitute for the words or signs expressive of it. We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute: *State v. Pattilo*, 11 N. C. 348; *State v. Stroll*, 1 Rich.

241; *State v. Grooms*, 5 Strob. 158. It may be said that a false representation or token is not within the statute "unless calculated to deceive persons of ordinary prudence and discretion": 2 Wharton on Criminal Law, 2129; *Commonwealth v. Grady*, 13 Bush, 285, 26 Am. Rep. 192. This is true only in a limited sense, for the statute was not designed to protect only the ordinarily wary and prudent, who, in spite of their vigilance, might be overreached by the clever rogue, but must have been aimed at all scoundrelism, who, by false statements or tokens, succeeded in hoodwinking the unwary, or even the foolish, into parting with their property. The statute has a twofold purpose: 1. To protect the owner of property against cheats; 2. To punish the cheater. It cannot be said that the law is partial to "persons of ordinary prudence and discretion" in protecting them in their property, whilst it leaves imprudent and silly persons as lawful prey for frauds. On ⁸²² the other hand, in punishing the wrongdoer, his motive and its results are the main subjects of inquiry. Under this statute the wicked purpose—the fraud—is equivalent to the same ingredient in theft. So is the result the same. The distinguishing feature is, in theft the owner does not intentionally part with the title and possession of his property, while under this statute he does. It would not do to say that to steal from a careless or imprudent person is not punishable, though the statutes against larceny aim to protect the owner in the possession of his property, as well as to punish the thief who purloins it. Under the statute being considered the pretense or token must be false. Where a token is used, it must be calculated to deceive, according to the capacity of the person to whom it is presented to detect its falsity under the circumstances. A token that might be calculated to deceive a blind man, or one in the dark, or a child, would not necessarily be a false token when used upon one who could see, and who has mature judgment: *Peckham v. State* (Tex. Cr. App.), 28 S. W. 532. Nor would absurd or irrational pretenses, not ordinarily calculated to deceive one of the intellectual capacity and discretion of the person upon whom it may have been practiced, be sufficient, it seems: *Woodbury v. State*, 69 Ala. 242, 44 Am. Rep. 515; *People v. Crissie*, 4 Denio, 525. Or, where the representation is as to the state of the title to real estate, a record of which is accessible to the vendee, the representation, though false, cannot be said to have induced the ac-

tion; for, as registration of deeds is provided for the express purpose of protecting purchasers of real estate, to which they are presumed to have recourse for final information concerning facts shown by them, and about the existence of which there need be no doubt, it cannot be said that the vendee could have been ⁸²³ deceived by the oral representations respecting the state of the title. This is the reason supporting the decision in *Commonwealth v. Grady*, 13 Bush, 285, 26 Am. Rep. 192; while in *Commonwealth v. Haughey*, 3 Met. 223, the facts were that Jones, the person alleged to have been defrauded, really parted with nothing upon the misrepresentation. Furthermore, it appears that the misrepresentation was as to quality of a crop of tobacco—a matter of opinion, not the subject of the statute. Whether the false token is one calculated to deceive one of the capacity and understanding and in the situation of the prosecuting witness is a question of fact to be found by the jury: *Wagoner v. State*, 90 Ind. 504. In *People v. Court of Oyer and Terminer*, 83 N. Y. 436, it is laid down distinctly that the pretenses must be calculated to deceive, leaving that to be determined by the jury; and, if the pretense was capable of defrauding, it is sufficient. There may be a state of facts where it would not be apparent upon their mere recital that they alone were capable of defrauding, and it may be the better practice in such cases to aver in the indictment that they were capable of defrauding, as well as did defraud, the prosecutor. But where the facts recited show upon their face that they are capable of defrauding, and it is charged that the defendant by them did intentionally and wickedly defraud the prosecuting witness, it seems to us to be useless to specifically charge that they were capable of defrauding. It is a matter of common and general knowledge that a Confederate ten dollar bill is quite similar in appearance to treasury silver certificates of that denomination, and that it is entirely capable to defraud credulous persons by its use under many circumstances. Whether there were peculiar circumstances in the case at bar to rebut the probability of such an effect upon the prosecuting witness is more properly evidential matter by ⁸²⁴ way of defense. The facts alleged in the indictment bring the transaction clearly within the statute, and the demurrer should have been overruled.

Judgment reversed, and cause remanded for further proceedings not inconsistent herewith.

The Crime of Obtaining Money under False Pretenses is the subject of a note to *Barton v. People*, 25 Am. St. Rep. 378. To constitute this crime, it is necessary that the false pretense should have deceived: *Chauncey v. State*, 130 Ala. 71, 89 Am. St. Rep. 17. However, a conspiracy to defraud by false pretenses may exist, although the means employed are not calculated to deceive persons of ordinary intelligence: *People v. Gilman*, 121 Mich. 187, 80 Am. St. Rep. 490.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY v. MARRS.

[119 Ky. 954, 85 S. W. 188.]

RAILROADS—Duty to Drunken Trespasser.—Where the yardmaster and foreman of the switch crew of one railroad company see a passenger of another railroad company aroused from a drunken stupor and put off a car on the depot platform at night, and a few minutes later find him drunk and asleep between the tracks in their switchyard, and thereupon arouse him and start him walking through the network of tracks and switches toward the highway, and a short time thereafter he lies down and goes to sleep on one of the tracks, where he is struck by their switch engine, the railroad company is answerable for his injuries. (pp. 293, 294.)

Thornton & Kerr and John Galvin, for the appellant.

Matt O'Doherty and Hunt & Hunt, for the appellee.

⁹⁵⁶ **BARKER, J.** William H. Marrs, a resident of Lexington, Kentucky, on a visit to Louisville, became intoxicated, and while in this condition his friends purchased a ticket for him over the Louisville Southern Railway to his home, put him on the train, and gave his ticket to the conductor. When the train arrived at the depot in Lexington he was in the smoker, asleep, with his head and arm hanging out of the window. One of the brakemen aroused him, and required him to go from the car to the platform of the station. The Louisville Southern Railway uses the depot of the Cincinnati, New Orleans and Texas Railway Company at Lexington. Near this depot are the private switchyards of the latter corporation. These yards are perhaps more than half a mile ⁹⁵⁷ in length, and covered with the network of tracks and switches; there being, probably, as many as eighteen or twenty separate tracks. The train on which Marrs was a passenger arrived at the Lexington depot at about 10:45 P. M. Within thirty or forty minutes after the

drunken passenger left the car he was found by the yardmaster, Savage, asleep in the switchyard between tracks Nos. 3 and 4. Appellant's switching crew, with their engine, coming along at this time, were stopped by the yardmaster, who called to some of them to come and assist him in arousing the sleeping man. This was responded to by James H. Joyce and John Haney, who left the engine and went to where Marrs was lying. Joyce shook the sleeping man who looked up, and, with an oath, said: "Kid, did you expect to find a man with his head cut off?" To which Joyce replied: "No, but if you lie around here in this way, you will have your head cut off." Whereupon Marrs got upon his feet, "hitched up his trousers," and walked off in the direction of the Versailles pike, cursing, as he went, the men who had disturbed him. The switching crew then went to their supper (a midnight lunch), and, returning in an hour, started with their engine along one of the tracks in the switchyard for the purpose of getting a car of stock which was to be transferred from one track to another. The engine was being backed, with several of the crew in front on the tender, keeping a lookout for the car of stock which they intended to shift. While proceeding at the rate of six or seven miles an hour, the engine ran over Marrs, who had again fallen asleep (this time on the track), inflicting injuries from which he in a few days died. To recover damages for the death thus occasioned, this action was instituted by the administratrix of his estate against both the Louisville Southern Railway and appellant. A trial ¹⁸⁸⁸ resulted in peremptory instruction being awarded in favor of the Louisville Southern Railway, and a verdict and judgment against appellant for the sum of four thousand five hundred dollars, of which it now complains.

Was appellant entitled to a peremptory instruction? This is the substantial question presented in the record.

There was no relation of passenger and carrier between Marrs and appellant, and therefore his entrance into the private switchyard of the corporation made him a trespasser; and, if those in charge of the switch engine had run it over him when he was first found in the yard, then, undoubtedly, appellant would have been entitled to a peremptory instruction under the evidence as adduced on the trial, because, he being a trespasser, its employes owed him no duty, except to refrain, after his peril was discovered, from injuring him,

if this could be done by the exercise of ordinary diligence. But having found him drunk and asleep in the yard, could they arouse him, and start him wandering in the dark, through the network of switches and tracks, and then say, when they afterward ran over him, that they owed him no lookout duty because he was a trespasser? We cannot sanction so cruel and inhuman a principle. Both Savage, the yardmaster, and Haney, the foreman of the switching crew, saw Marrs on the Louisville Southern train when it reached the depot, and knew that he was a passenger thereon and drunk. When they saw him in the switchyard, asleep, and aroused him, they recognized him as the man they had seen on the train. They knew he was still intoxicated, and the fact that within so short a time he was found by them asleep in the switchyard was all the evidence that reasonable men required to know that, owing to his condition, he was unable to take care of himself, and more than probably was dazed and lost. Under these circumstances, it was ⁹⁵⁹ their duty either to see him safely out of the yard or, in default of this, to exercise at least ordinary care to avoid injuring him in moving the switch engine about where, under the circumstances, it was reasonable to anticipate his presence. Haney and Savage, within forty minutes before they found Marrs asleep in the switchyard, had seen him asleep on the train. They had seen him aroused from his stupor by the brakeman and put upon the platform, and when they found him, within so short a time after being aroused by the brakeman, again in a stupor in the switchyard, they were bound to know that his condition was such as to render him incapable of taking care of himself; and, this being true, as we have before said, common humanity forbade them simply to arouse him from where they found him asleep, and start him on another walk, merely to sink into a torpor in the yard a second time. Indeed, the action of these men was a positive injury to the decedent, for, as he lay between tracks Nos. 3 and 4, he was then, at least, safe from being run over. When they aroused him from this position, and started him on his walk in the dark through the yards, they subjected him to the perilous chance, when again overcome by the liquor, of assuming a position of greater danger than he was occupying at first. This chance subsequently became a reality. When the unfortunate man was overcome a second time in the yard, he

went to sleep on one of the tracks instead of between them. Under the circumstances, the switching crew should have done either more or less than they did, so far as the safety of the deceased was concerned.

We fully concede that Marrs being drunk did not make him any the less a trespasser when he first went into the yard of the corporation, and his intoxication added no new duty from it to him then. But when its servants actually discovered ⁹⁶⁰ him, trespasser though he was, they owed him the duty to refrain from injuring him, and this duty was as comprehensive as the helplessness of his condition demanded to insure his safety from injury by them. The fact that his senses were overcome by liquor was demonstrated by what the servants of the corporation actually knew at the time they found him in the yard. It was no longer a question of surmise, but one of positive knowledge. That he was not a tramp awaiting an opportunity to steal a ride they knew from the fact that they had seen him arrive in Lexington as a passenger on the Louisville Southern train, and we think we have a right to assume, from all the evidence in the case concerning Marrs, that his appearance indicated him to be what he really was—an unfortunate man on a spree. The servants of the corporation, after finding him in the yard, could not shut their eyes and close their faculties to what must have been apparent to the most casual observer, and say that, under the circumstances surrounding Marrs, they owed him no duty, and could after that treat him as a trespasser. They knew he was intoxicated and in the yard, and, having seen him twice before within an hour in a drunken stupor, they had no right to assume that when left to himself he would not again sink into a torpor, as he had done twice before.

This case comes within the principle of *Fagg's Admr. v. Louisville etc. R. Co.*, 111 Ky. 30, 23 Ky. Law Rep. 383, 63 S. W. 580, 54 L. R. A. 919. In that case the employes of the railroad knew a drunken man had entered a deep cut through which a train was soon expected. They knew that, if this train passed while he was in this cut, his life would be in peril. With this knowledge they permitted the train to run into the cut without informing those in charge of the perilous position of the unfortunate man. He was killed, ⁹⁶¹ and we held the corporation responsible. The principle

in that case is identical with that at bar, although the facts on the surface are somewhat variant. The servants of appellant knew that Marrs was in the yard in a drunken condition. They had seen him asleep in a stupor. They were bound to know that the chances were that, as soon as the stimulus of their presence was removed, he would again succumb to the benumbing influence of the liquor with which he was intoxicated. This being true, they owed him one of two alternative duties—either to see him safely out of the yard, which common humanity required, or, failing in this, to watch out for him as the engine was moved about in the corporation's business. The case of *Brown's Admr. v. Louisville etc. R. Co.*, 103 Ky. 211, 19 Ky. Law Rep. 1873, 44 S. W. 648, does not support appellant. In that case the servants of the corporation had no right to suppose, after the drunken passenger was removed from the train at London, he would seek the railroad track as a bed. In this case the employes of appellant knew that Marrs was likely to do this, for they had just aroused him up from such a position. Nor is the case of *Virginia M. R. R. v. Boswell's Admr.*, 82 Va. 932, 7 S. E. 383, authority in favor of appellant's claim to a peremptory instruction. In that case the trackwalker found the trespasser lying on the railroad track. He accosted him, whereupon the man aroused up on his elbow, and apparently assented, when told to get off the track, as a train would presently be coming along. The corporation's servant did not know that the trespasser was drunk, or in any other way physically incapacitated; the court on this point stating: "There was nothing in the conduct of Boswell which could lead Harrison to suspect that he was drunk or physically disabled. When accosted by Harrison, ⁹⁶² and told that he must get up and get off the track—that a train was coming presently—he (Boswell) got partly up, leaned on his elbow, and assented to the suggestion in such a manner as to convince Harrison that he understood him; and, under these circumstances, Harrison had the right to presume that Boswell would take such measures to protect himself from danger as reasonable persons would be sure to take under such circumstances." In the case at bar, appellant's servants knew Marrs was drunk, and the circumstances surrounding him were such as would lead any reasonably prudent person to believe that he was incapable of caring for himself. Under these circum-

stances, we think they, after having discovered his perilous condition, owed him the duty of refraining from injuring him by exercising the care for his safety which we have indicated.

The trial court correctly overruled appellant's motion for a peremptory instruction, and the instructions given were as favorable to the corporation as it merited. Perceiving no error in the record prejudicial to appellant's substantial rights, the judgment is affirmed.

Petition for rehearing by appellant overruled.

Drunkenness Never Excuses a person for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Drunkenness does not exempt a person from responsibility for contributory negligence: Nash v. Southern Ry. Co., 136 Ala. 177, 96 Am. St. Rep. 19; Bageard v. Consolidated Traction Co., 64 N. J. L. 316, 81 Am. St. Rep. 498. Therefore, a railroad company is not liable for the injury on its tracks of a drunken trespasser, in the absence of willful or wanton conduct: Nash v. Southern Ry. Co., 136 Ala. 177, 96 Am. St. Rep. 19. As to the duty of a railroad company to see that an intoxicated person does not get upon the tracks and thus expose himself to danger, see Bageard v. Consolidated Traction Co., 64 N. J. L. 316, 81 Am. St. Rep. 498.

CASES
IN THE
SUPREME COURT
OF
MAINE.

STATE v. FREDERICKSON.

[101 Me. 37, 63 Atl. 535.]

STATUTES—Construction.—Two chapters of the Revised Statutes of a state relating to the same subject, though having no immediate connection with each other, should be construed together. Hence one chapter of such statutes enumerating what are to be deemed intoxicating liquor must be construed in connection with the words “intoxicating liquor” as used in another chapter of such statutes. (pp. 297, 298.)

INTOXICATING LIQUORS—Construction of Statute.—A statute enumerating certain liquors, including “cider,” when kept and deposited with intent to sell them for tippling purposes, or as a beverage, and declaring them to be intoxicating, was intended to include and does include “cider,” when kept and sold for tippling purposes or as a beverage, even though such cider may be unfermented and non-intoxicating in fact. (pp. 299, 300.)

INTOXICATING LIQUOR—Statutory Construction.—When it appears that a certain liquor comes within the scope of a forbidden statutory enumeration as intoxicating, that moment its character becomes fixed by law, and its nonintoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute. (p. 300.)

INTOXICATING LIQUORS—Constitutional Law.—The constitutional right of the state legislature to regulate or prohibit the sale and keeping of intoxicating liquors, and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact is a legal exercise of the police power of the state and not in contravention of either the state or United States constitutions. (pp. 302, 303.)

W. C. Eaton, county attorney, for the state.

M. P. Frank, for the defendant.

³⁹ **SPEAR, J.** This case covers two actions, one involving a complaint for keeping a tippling-shop, and the other an indictment for maintaining a common nuisance. Both the

complaint and the indictment are based upon the same state of facts, wherein it is admitted that the respondent during the period covered by the complaint and the indictment was a citizen of the United States and a licensed victualer, and kept a restaurant on India street in Portland, in the county of Cumberland, and was accustomed to keep in his restaurant cider, with intent to sell the same as a beverage and for tippling purposes, and that frequently during that period he there sold cider to be drank on the premises, and the same was so there sold and drank, but said cider was unfermented and nonintoxicating in fact.

With respect to the complaint the defendant requested the instruction that section 40 of chapter 29 of the Revised Statutes did not apply to unfermented, nonintoxicating cider, and that the having of ⁴⁰ such cider on deposit with intent to sell the same as a beverage and for tippling purposes constituted no offense. Also, if it should be found that section 40 did apply to the keeping and sale of such cider, imposing penalties of fine and imprisonment for the violation thereof, its provisions are contrary to and in violation of section 1, article 1, of the declaration of rights in the constitution of Maine, and of the fourteenth amendment of the constitution of the United States, and to that extent are null and void.

With respect to the nuisance indictment, the defendant requested the instruction that if the respondent kept and maintained a place used for the sale or keeping for sale, for tippling purposes or as a beverage, of cider, and where cider was kept and deposited with intent to sell the same for tippling purposes or as a beverage, he would not be guilty of maintaining a nuisance under provisions of sections 1 and 2, chapter 22 of the Revised Statutes, unless such cider was in fact intoxicating, and that the keeping and maintaining of such place used for the sale or keeping for sale or for selling of unfermented nonintoxicating cider only, would not constitute the crime of keeping and maintaining a nuisance. The other requested instruction raised the same constitutional questions involved in the instruction with reference to the complaint.

The two cases can be construed together, inasmuch as if it is held that the enumeration of intoxicating liquors specified in section 40 of chapter 29 of the Revised Statutes, does not apply to the intoxicating liquors referred to in sections 1 and 2, chapter 22 of the Revised Statutes, then that is the end of

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the nuisance case and the exceptions must be sustained. If, on the other hand, it is held that said enumeration does apply, then the two cases with respect to all the points raised fall within the same category and involve the simple questions, whether the keeping and selling of unfermented, nonintoxicating cider as a beverage and for tippling purposes is inhibited by chapter 29, and if so inhibited, if said chapter is constitutional.

We will therefore determine, first, whether the enumeration of intoxicating liquors found in section 40, chapter 29, shall be held to define the meaning of the words "intoxicating liquors," as used in sections 1 and 2, chapter 22, relating to nuisances. To determine ⁴¹ this proposition, we assume, arguing, that unfermented, nonintoxicating cider, kept for sale and sold as a beverage and for tippling purposes comes within the above enumeration of liquors classed as intoxicating. The question raised by this exception whether such cider does, as a matter of law, come within the purview of section 40 will be discussed later.

The proposition before us has been lately considered, and we think fully settled, in the recent case of *State v. O'Connell*, 99 Me. 61, 58 Atl. 59. Like the case at bar, it arose under an indictment for maintaining a nuisance. The respondent was indicted for selling "uno beer," a malt liquor. The question involved in the trial and under the exceptions was not whether this beer was in fact intoxicating, but, regardless of this fact, whether it came within one of the classes of liquors denominated intoxicating under section 40, chapter 29.

The court by necessary implication squarely held that, although one of the indictments was under chapter 17 of the Revised Statutes of 1883, now chapter 22, the question of whether the liquor was to be regarded as intoxicating was to be determined by reference to chapter 27 of the Revised Statutes of 1883, now chapter 29. In deciding the character of the liquor the opinion says: "Revised Statutes of 1883, chapter 27, section 33, amounts to a prohibition of the sale of malt liquor." But malt liquor is not mentioned under chapter 17, yet being classed as intoxicating under chapter 27, it was held to be intoxicating under chapter 17.

But under the established rules of construction the two sections of the statutes should be construed together. Both sections are part of the same body of revised laws. We see

no good reason why chapters of the same statute should not be construed with reference to each other as well as sections of the same chapter. Chief Justice Shaw, in *Commonwealth v. Goding*, 3 Met. 130, says: "In construing the Revised Statutes, we are to bear in mind that the whole were enacted at one and the same time, and constitute one act; and then the rule applies, that in construing one part of a statute, we are to resort to every other part to ascertain the true meaning of the legislature in each particular provision. This rule is peculiarly applicable to the Revised Statutes, in which, for the convenience of analysis and classification of subjects, provisions are sometimes widely separated from each other in the code, which have so immediate a connection with each other that it is quite necessary to consider the one, in order to arrive at the true exposition of the other."

The suggestion in the above quotation that "the whole were passed at one and the same time" was not intended, we apprehend, to in any degree limit the rule of comparing statutes, whenever enacted, in *pari materia*—a principle well established by our own as well as other courts: *Gould v. Bangor etc. R. R.*, 82 Me. 122, 19 Atl. 84; *Cotton v. Wiscasset etc. R. R. Co.*, 98 Me. 511, 57 Atl. 785; *Commonwealth v. Sylvester*, 13 Allen, 247.

Black on Interpretation of Laws, page 6, in discussing this principle says: "The phrase 'statute in *pari materia*' is applicable to private statutes or general laws made at different times, and in reference to the same subjects. . . . So, also, all the laws of the state, whenever passed, relating to the subject of the regulation of the liquor traffic, are in *pari materia*."

Commonwealth v. Shea, 14 Gray, 386, is a case precisely analogous in principle to the phase of the case now under consideration, and declares that "the provisions of Statutes of 1855, chapter 405, section 1, by which 'all buildings, places or tenements used for the illegal sale or keeping of intoxicating liquors are declared to be common nuisances, and are to be regarded and treated as such,' is to be construed by reference to the Statutes of 1855, chapter 215, in *pari materia*, to which it is necessary to refer in order to ascertain what intoxicating liquors it is illegal to sell; and the first section of which declares that 'ale, porter, strong beer, lager beer, cider and all wines, shall be considered intoxicating liquors within the meaning of this act. Proof of sales of cider was, therefore, competent in support of this indictment.' "

State v. Hughes, 16 R. I. 403, 16 Atl. 911, is a case also directly in point, and holds that statutes, although enacted at different times, if they have a common object and are parts of one system for the punishment of illegal selling and keeping of liquors, are to be construed together: See, also, United States v. Freeman, 44 U. S. 556, 11 L. ed. 724; Linton's Appeal, 104 Pa. 228; United Soc. v. Eagle Bank, 7 Conn. 456; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Our conclusion is that the proposition is well settled both by the ⁴³ decisions and by the rules of statutory construction that the enumeration of liquors declared to be intoxicating, contained in section 40 of chapter 29 of the Revised Statutes, is referred to by, and was intended to include, the words "intoxicating liquors" as used in section 1 of chapter 22 of the Revised Statutes. It is therefore manifest that if unfermented and nonintoxicating cider is found to be an intoxicating liquor within the definition laid down in section 40, chapter 29, it is also an intoxicating liquor within the meaning of sections 1 and 2 of chapter 22, and if kept for sale and sold in violation of said sections, the premises where so kept would be subject to indictment as a nuisance.

This brings us to the consideration of the second proposition, whether the enumeration of liquors declared to be intoxicating, contained in section 40 of chapter 29, was intended to include cider which is kept and deposited with intent to sell the same for tippling purposes or as a beverage, which is unfermented and nonintoxicating in fact. If it is found to be so included, then both the complaint and indictment are sustainable unless it appears that section 40, with respect to the kind of cider herein specified, is in contravention of the state or federal constitutions. Section 40 declares that "wine, ale, porter, strong beer, lager beer or other malt liquors and cider, when kept and deposited with intent to sell the same for tippling purposes, or as a beverage, as well as distilled spirits, are declared intoxicating within the meaning of this chapter." The liquors above enumerated are declared intoxicating by law.

In determining whether or not a liquor is to be regarded as intoxicating under this enumeration it is entirely immaterial whether it is intoxicating in fact. As was well said in State v. O'Connell, 99 Me. 61, 58 Atl. 59: "It is not for the jury to revise the judgment of the legislature and determine whether liquor is or is not in fact intoxicating." When it

appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its nonintoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute: *State v. Piche*, 98 Me. 348, 56 Atl. 1052; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *Commonwealth v. Bloss*, 116 Mass. 56; *Commonwealth v. Anthes*, 12 Gray, 29; *Commonwealth v. Brelsford*, 44 161 Mass. 61, 36 N. E. 677; *Commonwealth v. Snow*, 133 Mass. 575; *State v. Intoxicating Liquors*, 76 Iowa, 243, 41 N. W. 6, 2 L. R. A. 408; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910.

Does unfermented, nonintoxicating cider fall within the above rule? Unless we read into the statute enumerating the kinds of prohibited liquors some adjective modifying the word "cider" that shall have the effect of differentiating between intoxicating and nonintoxicating cider, then it is evident that both cases at bar come, by the express terms of the statement of facts, within the prohibition of the respective statutes under which they are brought.

We do not feel authorized to modify the statutes by the interpolation of any such adjective. It is not the province of the court to legislate. Had the legislature, during all the years that the prohibitory statutes have been upon the books, intended that any differentiation should be made with respect to new and old cider, they unquestionably would have seen that it was effectuated by proper legislation. A moment's reflection will readily suggest that such legislation has been withheld advisedly. Unfermented, nonintoxicating cider by the simple lapse of time becomes intoxicating. There is a dividing line somewhere in the course of time over which the same cask of cider, in the process of fermentation, passes from a nonintoxicating to an intoxicating liquor. But where? To locate this line is to nullify the statute. Hence the absence of legislation. This view is sustained not only by reason but by authority.

State v. Spaulding, 61 Vt. 505, 17 Atl. 844, is precisely in point. It involved the construction of a statute which provides that "no person shall sell or furnish cider or unfermented liquor at or in a victualing-house, tavern, grocery-shop, cellar or other place of public resort." The point raised in this case is identical with that raised in the cases before us. The court say: "The only prohibition as to cider is at the places specified in the sixth paragraph, but not there

or anywhere in the statute is there any word qualifying the kind of cider prohibited at such places. The term used is "cider." It is said that the juice of apples is not cider until it is fermented. This is perhaps technically correct, but not in popular understanding. The apple juice when it comes from the cider press is immediately and universally called "cider" by the people generally. The term should be ⁴⁵ construed according to such universal use and understanding. Presumably no class of men understand better the difference between sweet and sour or new and old cider than our legislators, because they are mostly farmers who make the cider, and those who are not living in the cider-producing state could hardly claim ignorance on so familiar a subject; yet in their prohibitory enactment they ignore all distinction, and simply say "cider." The prohibition is limited to certain specified places, and such as indicate an intent only to prevent cider selling and drinking at public resorts, not to interfere with the manufacturer who does not make his establishment a public resort for drinking purposes like the saloon. It is well known, also, that the fermentation of cider, and the change from sweet to sour, so as to become more or less alcoholic, greatly varies—sometimes being very rapid, at other times very slow. It would be practically impossible to prove whether a particular mug of cider that had been drank was intoxicating, and to require it would therefore render the statute nugatory. In view of all these facts, we think it would be more likely carrying out the legislators' intent to construe the enactment according to its plain and common meaning, rather than to interpolate qualifying terms, and hold that the legislature meant something different from what it said. We therefore hold that the prohibition as to the places named is absolute, regardless of the stage of fermentation or the intoxicating quality of the cider."

Our conclusion is that the enumeration of liquors declared to be intoxicating and contained in section 40 of chapter 29 of the Revised Statutes, was intended to include, and does include, cider when it is kept and deposited with intent to sell the same for tippling purposes or as a beverage, even though such cider may be unfermented and nonintoxicating in fact.

The third question raised by the exceptions is whether section 40, with respect to cider that is unfermented and nonintoxicating in fact is in violation of section 1 of article 1 of

the constitution of the state of Maine. This involves the consideration of, first, the constitutional right of the legislature to regulate or prohibit the sale and keeping of intoxicating liquors; and second, the constitutional right of the legislature to declare certain liquors intoxicating within the ⁴⁸ meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact. Both of these questions are so universally answered in the affirmative by the decisions in our own state and those of other states under similar constitutional provisions that it is no longer a question for argument or even of doubt: *Lunt's Case*, 6 Me. 412; *Gray v. Kimball*, 42 Me. 299; *State v. Miller*, 48 Me. 576; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *State v. Roach*, 75 Me. 123. There are also numerous cases in other states to the same effect.

The affirmative of the second question is equally well established: *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *Commonwealth v. Anthes*, 12 Gray, 29; *Commonwealth v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *State v. Gravelin*, 16 R. I. 407, 16 Atl. 914; *State v. Intoxicating Liquors*, 76 Iowa, 243, 41 N. W. 6, 2 L. R. A. 408.

We now come to the last proposition raised by the exceptions, and that is, whether section 40, with respect to the sale of cider which is unfermented and nonintoxicating, in fact is in violation of the fourteenth amendment to the constitution of the United States. And here two questions must be considered: First, whether this provision of the federal constitution is violated by a state law regulating or prohibiting the sale and keeping for sale of intoxicating liquors; and second, whether it is violated by a state law declaring certain liquors intoxicating, within the meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact. The answer to both these questions is that a state law regulating or prohibiting the selling or keeping for sale of intoxicating liquors is a legal exercise of police power, and is not in contravention of the fourteenth amendment to the federal constitution. This has been repeatedly held and can be no longer an open question: *United States v. Ronan*, 33 Fed. 117, *In re Hoover*, 30 Fed. 51; *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129, 21 L. ed. 929; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346; *Boston Beer Co. v. Massachusetts*, 97 U. S.

25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *License Cases*, 46 U. S. 504, 12 L. ed. 256; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 8, 97, 28 L. ed. 629; *Eilenbecker v. Plymouth County*, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. ed. 801.

Exceptions overruled.

The Legislative Department of the State, in the exercise of the police power, is vested with plenary power to regulate or absolutely prohibit the sale of intoxicating liquors: *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437, and cases cited in the cross-reference note thereto; *Equitable Loan etc. Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 34; but the principal case goes further and authorizes the legislature to declare beverages to be intoxicating whether or not, as a matter of fact, they belong to that class. The language employed by the court justifies the conclusion that the legislature has power to declare pure milk or water to be intoxicating and therefore to prohibit its use or sale. However well supported by authority this conclusion may be, it is, upon principle, arrant nonsense. The judgment of the court is, however, defensible, with respect to the liquor there in question, on the ground that, as it is often intoxicating, the statute involved must be rendered practically inoperative unless all cider be deemed to fall within its prohibition.

BIBBER v. CARVILLE.

[101 Me. 59, 63 Atl. 303.]

EQUITY JURISDICTION—Unilateral Mistake—Cancellation of Contract.—While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a person whose conduct has in no way contributed to or induced the mistake, and who will gain no unconscionable advantage thereby. (p. 305.)

EQUITY JURISDICTION—Relief Against Mistake.—Equity does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call a court of equity into activity. (p. 305.)

EQUITY JURISDICTION—Relief Against Mistake.—If a person has acted in ignorance of facts merely, courts of equity will never afford relief against mistake when actual knowledge would have been obtained by the exercise of due diligence and inquiry. (p. 305.)

EQUITY JURISDICTION—Mistake—Cancellation of Deed.—If a grantor gives a warranty deed of land which he does not own, under the mistaken belief that he has title thereto, equity will not cancel the deed when there is no fraud, falsehood, misrepresentation or concealment on the part of such grantor. (p. 306.)

F. E. Southard, for the plaintiff.

R. F. Springer, for the defendant.

60 POWERS, J. Exceptions to a decree sustaining a demurrer to the plaintiff's bill and dismissing the bill with costs.

In substance, the bill alleges that Denham Hall, being the owner of a lot of land in Bowdoin containing about one hundred acres, mortgaged the same to James M. Hall in 1866, and to one Bibber in 1870. In 1880 James M. Hall assigned the mortgage to Bibber, who in 1888 foreclosed the mortgage given to him and the foreclosure became absolute. Bibber died in 1897, leaving as his sole heir at law the plaintiff, who in 1902, conveyed the premises to the defendant by warranty deed. At the time he gave the deed, the plaintiff believed that he had full title to the premises, but being afterward notified by the defendant that such was not the case, he investigated the matter in the registry of deeds, and found by the records therein that Bibber and Denham Hall, the mortgagor, in 1873 conveyed about twenty-five acres of the premises to one Cox, who, the plaintiff alleges he is informed and believes, has ever since claimed to be in possession thereof. Thereupon the plaintiff offered to return the consideration and asked the defendant to reconvey. The defendant declined to accept the money or reconvey, and brought suit for covenant broken, which is now pending in court. Plaintiff in his bill further offers to pay back the consideration received from the defendant and also such other sum, if any, as justice and equity may require; and prays that the deed to the defendant may be canceled and for an injunction against the prosecution of said suit.

Does the plaintiff present a case for equitable relief? No fraud, falsehood, misrepresentation or concealment on the part of the defendant, the grantee, is alleged. There was no mistake as to the terms ⁶¹ of the deed. It expressed precisely what the parties intended. There was a mistake on the plaintiff's part as to the title, resulting in the not uncommon case of a man giving a warranty deed of land which he does not own. Our attention has been called to no case where, under the circumstances such as are here alleged, a deed has been canceled on the prayer of the grantor.

"Defects in the title do not entitle the grantor to a rescission of the conveyance": 8 Am. & Eng. Ency. of Law, 2d ed., 222. We see no reason why the grantee, who acted in good faith, is not entitled in good conscience to retain the benefit of the contract which he made. The grantor, who re-

ceived the full price he set upon the property, has no equitable right to deprive him of it simply because he was mistaken as to his title and is liable upon his covenants. While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby.

There is another reason why the plaintiff cannot prevail. Equity assists only the vigilant. It does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call a court of equity into activity: *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833. The plaintiff claimed title as heir at law of Bibber. The true state of the title appeared on record. He does not allege that before the conveyance he ever examined the records to ascertain what title at the time of his decease Bibber had to the premises. After the conveyance he examined the records and found that Hall, the mortgagor, and Bibber, the mortgagee, had united in conveying a part of the premises to Cox, who, the plaintiff says he is informed and believes, has ever since, for more than thirty years, claimed to be in possession of the part so conveyed. The same investigation before he gave his deed would have revealed to the plaintiff the extent of his title and corrected his mistake. The bill alleges no reason whatever for the mistaken belief which he entertained. We cannot think it reasonable diligence for a man to assume, without examination of the records, that as heir at law he has a perfect title to land conveyed to the intestate twenty-seven ⁶² years before his decease, and of which it is not claimed he ever had possession. "When a party has acted in ignorance of facts merely, courts of equity will never afford relief when actual knowledge would have been obtained by the exercise of due diligence and inquiry": *McDaniels v. Bank*, 29 Vt. 230, 70 Am. Dec. 406. To relieve a party under such circumstances would be to encourage culpable negligence: *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490. In that case an examination of the records in the town clerk's office would have given the complainant the information. To the same effect is *Deare v. Carr*, 3 N. J. Eq. 513. In a later case, *Graham v. Berryman*, 19 N. J. Eq. 29, the same court thus states the prin-

ciple: "When a party ought in the exercise of ordinary prudence to have made inquiry, and neglects to ascertain the facts upon which his contract is based, in cases where it is not necessary to repose confidence in the other party, or where it is as much his duty as that of the other party with whom he deals to know the facts, courts of equity will not relieve against his own negligence."

In conclusion it is to be noted that this is not a case where a court of equity is asked to reform a deed which, on account of mutual mistake, does not represent the intention of the parties. In this case the court is asked to cancel a deed which expressed just what the plaintiff intended it should. The mistake was unilateral, on the part of the grantor alone, induced by no fraud, falsehood, misrepresentation or concealment of the grantee, relating to the grantor's own title, the true state of which ordinary care and diligence on his part would have revealed to him. It does not appear that the grantor will obtain an unconscionable advantage by the deed, or that he will not be fairly compensated for his liability on his covenants by the purchase money which the grantee paid him. Under these circumstances equity will not interfere to cancel the deed and deprive the grantee of the benefit of a contract fairly made.

Exceptions overruled.

Equity Will Grant Relief Against a Mistake of fact only when it is of such a nature that it could not, with reasonable diligence, have been avoided at the time. Relief will not be given against the results of inexcusable negligence: *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267. And the mistake, as a rule, must be mutual, in order to warrant equitable relief: See the note to *Williams v. Hamilton*, 65 Am. St. Rep. 490.

A *Mistake* as to the ownership of a lot of land is a mistake of fact; and an erroneous view of the legal effect of a deed in a chain of title is a mistake against which equity will grant relief: See *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, and cases cited in the cross-reference note thereto.

IVERS & POND PIANO COMPANY v. ALLEN.

[101 Me. 218, 63 Atl. 735.]

TROVER AND CONVERSION—Second Mortgage of Chattels. If a person first gives a mortgage on chattels to one who does not record it, and then gives another mortgage on the same chattels to a person who records it, the giving of the second mortgage is an illegal and unauthorized exercise of dominion over the chattel, inconsistent with, and detrimental to, the rights of the first mortgagee and constitutes a conversion of such chattels by the mortgagor without any manual transfer of the property. (p. 308.)

W. R. Pattangall, for the plaintiff.

H. H. Gray and A. D. McFaul, for the defendant.

220 POWERS, J. Trover for a piano. In July, 1904, the plaintiff delivered the piano to the defendant, who at that time executed and delivered to the plaintiff a lease or agreement in regard to the same, reciting that she had paid ten dollars for rent until August 7, 1904, and was to pay eight dollars a month for the use of the same, as long as she hired the piano, until three hundred dollars and interest on unpaid balances of that sum was paid, and that, if she fulfilled her agreements till the payments of rent amounted to three hundred dollars and interest, the piano should become her property. This instrument was never recorded. The defendant paid as agreed up to February, 1905, when the piano was destroyed by fire. On December 28, 1904, the defendant mortgaged the piano to one Means, who recorded his mortgage but never took possession of the property. The presiding justice ordered a nonsuit and the plaintiff excepted. By agreement of the parties if the nonsuit was incorrectly ordered, the plaintiff is to have judgment for two hundred and fifty dollars.

The so-called lease was in substance a conditional sale, not valid, except between the original parties, without record: Rev. Stats., c. 114, sec. 5. The plaintiff's mortgage of the piano, not simply of **221** her interest in it, conveyed a good title to Means. Before that mortgage and its record the plaintiff had the full title to the property, subject to the defendant's equity of redemption. After that the plaintiff had simply the right to redeem from the Means mortgage. The fact that the plaintiff saw fit to trust to the defendant's honor instead

of recording its lease gave her no right to sell or dispose of the piano in any way that would injuriously affect its rights. As against the defendant its claim was valid, and her mortgage of the property was an illegal and unauthorized exercise of dominion over it, inconsistent with and detrimental to the rights of the plaintiff. It requires neither citation nor argument to show that such an act, carrying with it such consequences, was a conversion of the property, without any manual transfer or removal of it. Indeed, we know of no accepted definition of a conversion which would exclude the facts of this case. It is sometimes said that a mere paper sale of a chattel without transfer of possession does not constitute a conversion. That is true where the rights of the owner to possession and his legal interest in and title to the chattel remain unaffected and unimpaired by the sale. Not so here, where the legal effect of the defendant's unlawful act deprived the plaintiff of its property and its right to possession thereof.

This case is not to be confounded with cases against a mortgagor, who has sold only his interest in the mortgaged property, as in *White v. Phelps*, 12 N. H. 382, or with cases against a vendee of the mortgagor, as in *Dean v. Cushman*, 95 Me. 454, 85 Am. St. Rep. 425, 50 Atl. 85, 55 L. R. A. 959, who obtains by his purchase a right of possession against all the world except the mortgagee.

Exceptions sustained.

Judgment for the plaintiff for two hundred and fifty dollars.

Conversion of Personal Property which will sustain an action of trover is considered in the note to *Bolling v. Kirby*, 24 Am. St. Rep. 795. If a mortgagor of chattels in possession sells and delivers the property, he is guilty of conversion: *Dean v. Cushman*, 95 Me. 454, 85 Am. St. Rep. 425. As to the right of a mortgagee to maintain an action for conversion, see *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, and cases cited in the cross-reference note thereto.

PURINTON v. PURINTON.

[101 Me. 250, 63 Atl. 925.]

EVIDENCE—Letters Read to Witness.—If one voluntarily and without solicitation reads the whole or a portion of a letter to another, and the person hearing does not undertake to repeat the contents of such letter, but only what the person purporting to read or state has said, such statements assume the form of an admission by the person holding the letter, and testimony of such evidence becomes primary evidence. This rule applies as against a plaintiff in divorce as to letters written by her after her marriage to the defendant to a third person and by him to her, the contents of which have been read to the witness. (p. 310.)

EVIDENCE—Admissions—Best Evidence.—If it is sought to use a written statement as an admission, the "best evidence" rule does not apply. (p. 311.)

EVIDENCE—Admissions and Statements made by a person are in all cases admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. (p. 311.)

EVIDENCE—Letters Written by Third Person.—A letter in the handwriting of a third person which appears to be one of many written by him to the plaintiff in divorce, and found under a couch in her room, is admissible against her. (pp. 312, 313.)

APPELLATE PRACTICE—Exceptions must be overruled unless they affirmatively show, without the aid of extrinsic evidence, not only that the ruling was wrong, but that the person complaining was aggrieved, so that if the ruling would be justified or would be harmless to the complainant upon any possible but not impossible situation unexplained by the exceptions, the doings below will not be disturbed or condemned. (p. 313.)

S. S. Brown, for the plaintiff.

Thompson & Wheeler, for the defendant.

251 SPEAR, J. This case involves a libel for divorce and comes up on exceptions to the admission of certain testimony. The charges in the libel were failure to support and cruel and abusive treatment. The answer of the libelee was a denial of every allegation laid in the libel as a cause for divorce and every specification offered therein under the allegations; and also a denial of the allegation in the libel that the libelant had been faithful to her marriage obligations ever since she became his wife, and charged that, on the contrary, during the same time she had offered him extreme and continuous provocation, and that her conduct during this time had been such as would have justified all that she charged

or could truly allege against him, and that during the same time her conduct with relation to men other than her husband had been immodest, improper, scandalous, ²⁵² indecent and criminal. Among the witnesses called by the defendant was one James Colby, who testified that soon after the marriage of the parties he carried numerous letters between this libelant and one Frank Bartlett, for whom Mrs. Purinton had done housework before her marriage with the libelee, and that the libelant had often read aloud to the witness the contents of letters written by said Bartlett to her and by her to him, and the defendant's counsel asked the witness to give in testimony such portions of the letters so read or stated to him by the libelant as he could remember. No effort had been made by the libelee to procure the letters and no notice had been given by the libelant to produce any such letters as she might have in her possession. The libelant's counsel objected to such inquiry, but the court allowed the witness to testify as to what was read or stated in them by the libelant. This ruling presents the first ground of exception.

The libelant claims that the letters themselves, if any such letters ever existed, were the best evidence of the contents of the letters, and that no secondary proof of their contents should be received until it was shown that the libelee had made all reasonable effort to obtain the letters. In other words, that the evidence offered to prove the contents of these letters, or any part of them, fell within the usual rule relating to the proof of the contents of written instruments. But we hardly think this position is tenable.

The case shows and the libelee contends that this evidence was not offered to prove the contents of the letters, but the statements or admissions of the libelant herself as to some of the statements contained in these letters. Proof of her voluntary admissions against her own interest would clearly be admissible by the testimony of any competent witness who might have heard such admissions. We are unable to see why the source of her admissions, whether made by her as voluntary statements of her own, purporting to be quotations from memory or to be read from some writing, should modify the general rule with respect to their proof. When one voluntarily and without solicitation reads the whole or a portion of a letter or writing to another, the party hearing does not undertake to repeat ²⁵³ the contents of the original writing, but only what the person purporting to read or state has said.

This is entirely different from an attempt on the part of a witness, who, having read a letter himself, undertakes to testify to its contents, when the letter, of course, is the best evidence. But when a party voluntarily assumes to state what is in a letter, or to read a portion of a letter, to another, then such statement assumes the form of an admission by the party holding the letter, and testimony of such admission becomes primary evidence under the general rule with reference to proof of admissions.

The testimony of Colby does not assume to give the legal effect of the letters, but shows to the extent of his recollection what was said by the libelant to have been their terms and import.

The libelee's legal position is fortified by authority as well as reason. 16 Cyclopaedia, page 944, lays down this rule: "When it is sought to use a written statement as an admission, the 'best evidence rule,' so called, does not apply; and a copy of a letter, for example, is competent when identified, without accounting for the original."

In *Kelly v. McKenna*, 18 Mich. 381, it was held that the copy of a letter which the writer of the original had admitted in its leading points to be a correct copy was as to these points converted into admissions by him and became original evidence. The court said: "It was of no consequence that the paper was a copy of the letter he had written. When he made its contents identical with his declaration, the paper became an original for the purpose of showing his declaration to Bruce." So in the case at bar, the testimony of Colby became primary for the purpose of showing the declarations of the libelant which purported to be identical with the letters from which she was quoting.

In *Smith v. Palmer*, 6 Cush. 513, the court say: "The admissions of a party stand on distinct grounds. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus, the statement of a party that certain lands had been conveyed might be admitted, ²⁵⁴ though the conveyance must be by deed or record. The general principle as to the production of written evidence as the best evidence does not apply to the admissions of parties;

as what a party admits against himself may reasonably be taken to be true."

In 1 Greenleaf on Evidence, sections 96 and 97, this rule is laid down: "It appears that the prevailing doctrine in England and this country is that a verbal admission of the contents of a writing by a party himself will supersede the necessity of giving notice to produce it; in other words, that "said admissions being made against the party's own interest can be used as primary evidence of the contents of a writing against him." In note A of section 96, above cited, it is said that while the rule as stated is denied in Ireland and New York, it is "the prevalent opinion in the United States."

In *Blackington v. Rockland*, 66 Me. 332, involving the proof of a notice to a town for injuries received upon a defective highway, in which the objection was raised that the records of the city were not competent evidence to show that a bill for damages had been presented without the production of the bill itself, our court held: "It has been decided that oral admissions of a party are admissible evidence of facts, though the facts are established by some writing. The records here would in effect be equivalent to the oral admission of an individual party or more than that." In this opinion the court also adopts the English decision in *Slatterie v. Pooley*, 6 Mees. & W. 664, which is referred to by Greenleaf in note A, *supra*, as the leading English case on this point.

In *Loomis v. Wadhams*, 8 Drake, 557, the court adopts the following quotations from Mr. Justice Parke: "What a party says is evidence against himself as an admission, whether it relates to the contents of a written paper or to anything else."

In *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887, Chief Justice Holmes says: "It is to be remembered with reference to this and other exceptions that admissions are evidence against a party making them although they relate to the contents of a written paper or to a corporate vote": See, also, *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Edgar v. Richardson*, ²⁵⁵ 33 Ohio St. 581, 31 Am. Rep. 571; *Edwards v. Tracy*, 62 Pa. 374; *Taylor v. Peck*, 21 Gratt. 11.

The second exception involves the admission of a letter written by Bartlett, found by the libelee behind a couch in a room vacated by the wife when she left her husband.

The exceptions do not show whether this letter was opened when found, or written before or after the marriage of the

libelant with the libelee, nor upon what grounds the judge found in the affirmative upon both of these points. But it is a well-settled rule of law that in the trial of a case it is to be presumed that things were rightly and regularly done except so far as the exceptions make it otherwise appear.

Exceptions must be overruled unless they affirmatively show, without aid from extrinsic evidence, not only that the ruling was wrong, but that the party complaining was aggrieved, so that if the ruling would be justified, or would be harmless to the complainant upon any possible but not improbable situation unexplained by the exceptions, the doings below will not be disturbed or condemned. Among the latest authorities upon this proposition are *Toole v. Bearce*, 91 Me. 209, 39 Atl. 558; *Hill v. Reynolds*, 93 Me. 25, 74 Am. St. Rep. 329, 44 Atl. 135; *Smith v. Smith*, 93 Me. 253, 44 Atl. 905; *Look v. Norton*, 94 Me. 547, 48 Atl. 117; *Atkinson v. Orneville*, 96 Me. 311, 52 Atl. 796; *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36.

Under these principles of law it must be held that the letter was in all respects properly admitted except those specifically stated in the exceptions, and, therefore, must be assumed that the evidence satisfied the court that the letter was written after the marriage and either found open or without any envelope.

When this letter was offered, it had already appeared in the case by legitimate evidence that Mrs. Purinton had been carrying on a clandestine correspondence with Bartlett, employing a private carrier; that many letters had passed between them. Then the letter found by the libelee was offered as one of the letters contained in the correspondence in which Mrs. Purinton had been an active participant.

The exceptions do not deny the passage of these letters between the libelant and Bartlett except the last one, simply alleging that ²⁵⁸ "Mrs. Purinton denies all such pretended reading of said letters by her to said Colby, and denies any such letters as the defendant exhibits." The libelee presented only the letter which is the subject of the second exception.

The only real question under this exception is whether under all the accompanying circumstances the finding of this letter will warrant the inference that it was received by the libelant notwithstanding her denial of having received it.

In view of the fact that the letter was in the handwriting of Bartlett, and appeared to be one of many which was writ-

ten to her by him, and was found under a couch in the room from which the libellant moved when she left her husband, the conclusion seems irresistible that she received the letter. How otherwise could such a letter, admitted to be in the handwriting of Bartlett, have found its way into her room? If the letter had been forged or not in the handwriting of Bartlett, with whom the evidence tends to show she had sustained a course of improper correspondence, it could not be admitted; but there is no pretense that it was forged or that it was in a handwriting other than Bartlett's, or that there was any collusion with Bartlett by which it was placed there, but a simple denial on her part that she ever received it. If that letter was not placed in that room through her hands, we are at a complete loss to know how it got there. The only reasonable explanation is that she received it and accidentally dropped it behind the couch or on the floor, and in that way left it to be found by her husband.

Exceptions overruled.

The Admissibility in Evidence of the Admissions of parties to a divorce is considered in the note to Richardson v. Richardson, 30 Am. Dec. 544. The admissions of a party to a divorce suit are generally regarded as competent evidence against him: Burke v. Burke, 44 Kan. 307, 21 Am. St. Rep. 283; Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924. See, however, Toole v. Toole, 112 N. C. 152, 34 Am. St. Rep. 479.

HAYES v. RICH.

[101 Me. 314, 64 Atl. 659.]

JUDGMENTS—Assignment.—Where a judgment must be deemed a chose in action upon which an action may be maintained by an assignee in his own name, an assignment of judgment in writing, although not under seal, is sufficient. (pp. 316, 317.)

EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate.—So great a breach of trust is it for the personal representative of a decedent to engage in business with the funds of the estate, that the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or, at their election, take all the profits which the representative has made. (pp. 318, 319.)

EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate.—It is the duty of an executor or administrator to

settle the estate, pay the debts, and distribute the surplus, and not to speculate in demands against creditors. If the latter transaction is indulged in, all loss must fall upon such personal representative. (p. 319.)

EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate—Recovery in Representative Capacity.—It is the duty of an administrator to collect a good note in favor of the estate in cash, and not to invest it in a worthless judgment at twenty cents on the dollar, and if he assumes the responsibility of employing the funds of the estate for such purpose, he must be deemed to have done so in his individual capacity. If an administrator thus changes the nature of the debt originally due the intestate by contract made with himself, he must sue for the new debt in his own name, and not in his representative capacity. (p. 320.)

EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate—Right to Recover in Representative Capacity.—If an administrator speculates with the funds of the estate and changes the nature of the debt originally due the intestate by a contract made with himself, his assumption that he can maintain an action thereon and recover judgment in his representative capacity is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that happened before the death of the intestate. (p. 320.)

JUDGMENTS—Assignment—Witnesses.—In an action on a judgment brought by an original judgment creditor or by his assignee in his individual capacity, the defendant therein is a competent witness as to all matters material to the issue; and any transaction or proceeding which would effectually render him incompetent in such action will not be tolerated or approved. (p. 321.)

G. W. Heselton and Heath & Andrews, for the plaintiff.

Williamson & Burleigh, for the defendant.

313 WHITEHOUSE, J. The first of these cases is an action of debt on a judgment for seven hundred and eight dollars and sixty-five cents recovered in 1899 by Albert A. Robbins against the defendant, Rich. It is alleged in the declaration that February 10, 1900, Robbins, for a valuable consideration, assigned this judgment "to Alvah R. Hayes, then the administrator de bonis of the Dingley Brothers estate." In support of this allegation the following instrument signed by Robbins was offered in evidence: "For a valuable consideration, in a note of one hundred and fifty dollars payable to F. B. Dingley, admr., d. b. n. Dingley Bros.' estate, dated Feb. 1, 1899, to me this day surrendered by A. R. Hayes, admr., d. b. n. of same estate, I assign and transfer to said estate the within judgment debt with full power in my name but without expense to me to collect the same."

The plea was the general issue with a brief statement denying that there was any assignment of the judgment to the plaintiff in his capacity as administrator as set forth in the declaration.

It was accordingly contended in behalf of the defendant, first, that the instrument in question was ineffectual as an assignment and inadmissible as evidence because not under seal; second, that under our statutes an assignee of a judgment could not maintain an action in his own name, and third, that in any event the instrument could not operate as an assignment of a judgment to Hayes in his capacity as administrator of Dingley Brothers, but only as an assignment to Hayes in his individual capacity, and hence fails to support the plaintiff's declaration.

These objections were severally overruled pro forma by the presiding judge, the assignment received as evidence, and judgment ordered for the plaintiff for eight hundred and eighty-eight dollars and ninety-five cents. The case comes to this court on exceptions to this ruling.

³¹⁹ The first and second propositions appear to have been decided against the defendant's contention. In *Dunn v. Snell*, 15 Mass. 481, the court say: "The objection to the assignment as offered to be proved by the witnesses is that it was not by deed, and the objection rests upon the general principle which was assumed by the counsel that an assignment of a specialty must be by an instrument of as solemn a nature as the instrument itself which is to be assigned. Considering a judgment as a specialty, it is obvious that, upon this general principle, it could never be assigned; because there is no instrument in pais of so high a nature as the record of a judgment in court. . . . It is not doubted that this debt, upon which the judgment was rendered, might have been assigned by writing without seal. . . . The judgment is only evidence of the debt, and if the execution is delivered over, with intent to transfer the debt, upon a fair bargain upon a valuable consideration, there is no reason why the transaction should not be as binding upon the parties as the parol assignment of a debt before it is reduced to judgment. And, in this case, the execution was in fact delivered to the use of the assignee, so that the judgment creditor could not have obtained another execution upon that judgment."

In *Prescott v. Hull*, 17 Johns. 284, the court said: "I do

not consider the want of a seal essential. The mere delivery of a chose in action upon good and valid consideration would be sufficient even were it a specialty": See, also, *Wood v. Decoster*, 66 Me. 542; *Ware v. Bucksport etc. R. R. Co.*, 69 Me. 97.

In the two last-named cases it was also decided that under section 146, chapter 84 of the Revised Statutes (originally chapter 235, laws of 1874), a judgment must be deemed a chose in action upon which an action might be maintained by the assignee in his own name.

In considering the peculiar terms of the instrument in question and its operation as an assignment with reference to the defendant's third contention, it is allowable to observe the situation of the parties at that time and the obvious purpose of this assignment.

In October, 1904, the defendant, Rich, obtained a verdict of two thousand and ninety-three dollars and twenty-five cents against the plaintiff, Hayes, in his capacity as administrator de bonis non on the estate of Dingley Brothers. The action which ³²⁰ finally resulted in this verdict was commenced April 9, 1900, and was based on a note originally for three thousand dollars bearing date December 29, 1894, given by Dingley Brothers to Rich. The motion for a new trial in this case was overruled by the law court, and the case went to judgment in October, 1905.

It is true that the plaintiff, Hayes, obtained the assignment of the Robbins judgment two months before the actual commencement of the original suit of Rich v. Hayes, last described, but it has been seen that the note on which this action was brought was dated December 29, 1894. It may reasonably be inferred from all the circumstances disclosed by the evidence to which we are permitted to refer that both Hayes and Fred B. Dingley, his predecessor in the administration of the estate in question, had reason to apprehend that a suit would be brought by Rich on his note against Dingley Brothers, and having an opportunity to purchase the Robbins judgment at less than twenty cents on the dollar, Hayes appears to have consummated the arrangement alleged to have been made by Fred B. Dingley, and obtained an assignment of the judgment in the obvious hope of being allowed to offset the full amount of it against any judgment that might be recovered by Rich on his three thousand dollar

note. But a judgment against Rich standing in the name of Robbins as plaintiff could not be offset against a judgment obtained by Rich against Hayes in his capacity as administrator d. b. n. of the estate of Dingley Brothers, and the suit at bar was manifestly brought for the purpose of obtaining a judgment in the name of Hayes, the assignee, in his capacity as administrator, in the expectation that in this form the Robbins judgment could be offset pro tanto against the larger judgment of Rich against Hayes, administrator. Accordingly, on the rendition of the judgment for two thousand and ninety-three dollars in favor of Rich, a motion to offset the Robbins judgment was promptly made.

It is the opinion of the court, however, that in the case at bar the plaintiff is not entitled to a judgment in his right and capacity as administrator. In the first place, it does not explicitly or satisfactorily appear that the one hundred and fifty dollar note invested by Hayes in the purchase of the Robbins judgment in fact represented any part of the assets of the estate of Dingley Brothers. It is described in the assignment, ³²¹ it is true, as "payable to F. B. Dingley, Admr. d. b. n. Dingley Brothers' estate," but there is no evidence from any witness having personal knowledge of the matter that it was given for any debt due the firm of Dingley Brothers in their lifetime.

But if it be assumed that the Robbins judgment was purchased by Hayes with funds belonging to the estate of Dingley Brothers, still, in a broader view of the question, insuperable objections present themselves arising from considerations of sound public policy, and the rights of a party in the situation of Rich as defendant in a suit in the Robbins judgment, which must prevent the plaintiff Hayes from recovering a new judgment in his name and capacity as administrator on the estate of Dingley Brothers. It is the recognized function of an administrator to settle the estate, reduce the assets to cash as far as necessary and practicable, pay the debts and legacies and under the order of court distribute the residue among those entitled to it under the intestate laws of the state. "So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make, the rule being that the

persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or at their election take all the profits which the representative has made by such unauthorized use of the funds of the estate": 18 Cyc. 241, 242, and cases cited.

In *Mead v. Merritt*, 2 Paige, 402, the facts were analogous to those at bar. In a suit by the defendant Peck against the plaintiff, as executor of the will of one Sherwood, the plaintiff alleged that he had purchased a note against Peck and asked to have it set off against the latter upon Sherwood's estate. It was further alleged, it is true, that Peck's claim had been assigned to the defendant Merritt for the purpose of defeating the plaintiff's claim to setoff, and the question of jurisdiction was also involved. But in the opinion Chancellor Kent says: "Independent of this question of jurisdiction, it is evident that the complainant has no right to the equitable interposition of this court. The note of Peck, which he ³²² purchased since the death of Sherwood, and now holds in his own right, could not, at law, be set off against Peck's demand upon the estate of the testator. And it would be inconsistent with the principles of sound policy to permit an executor to buy up claims against creditors of an estate, for the purpose of obtaining a setoff in equity": 2 Paige, 405.

So in *Dudley v. Griswold*, 2 Bradf. 24, the court say: "It is the duty of an executor or administrator to settle the estate, pay the debts and distribute the surplus, and not to speculate in demands against creditors."

The distinction between the duty and authority of an administrator, and the functions of a trustee or receiver, is so well established and a matter of such common knowledge as to render unnecessary the citation of authorities or any extended discussion of the subject. It has been recognized from time immemorial as the characteristic duty of an administrator to settle the estate of his intestate with reference to the situation of the assets at the time of the death of the decedent, and not attempt, by trade or speculation, to adjust the affairs of the estate upon an entirely different basis, which might seriously affect the question of distribution and in some instances render the estate insolvent: See the numerous cases upon the question of setoff in *Rich v. Hayes*, 101 Me. 324, post, p. 321, 64 Atl. 656. In the case at bar it appears that at the time Hayes purchased the Robbins judgment, Rich was

hopelessly insolvent, and had no available property with which to satisfy any judgment, except the note in suit in *Rich v. Hayes*, 101 Me. 324, post, p. 321, 64 Atl. 656; while, on the other hand, there is no evidence that Robbins was not entirely solvent and able to pay the note for one hundred and fifty dollars which the plaintiff held against him. It was the obvious duty of the plaintiff, if acting for the interest of the estate which he represented, to collect this note in cash, and not invest it in a worthless judgment at twenty cents on the dollar. If he assumed the responsibility of employing the funds of the estate for such a purpose, he should be deemed to have done so in his individual capacity; and if an administrator thus changes the nature of the debt originally due the intestate by a contract made with himself, he must sue for the new debt in his own name, and not in his representative ³²³ capacity: *Helm v. Van Vleet*, 1 Blackf. (Ind.) 342, 12 Am. Dec. 248; *Bond v. Corbett*, 2 Minn. 209; *Burdynne v. Mackey*, 7 Mo. 374.

Again, the assumption that the plaintiff can maintain this action and recover judgment in his capacity as administrator is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that happened before the death of the plaintiff's intestate. In an action on a judgment brought by the original judgment creditor or by an assignee in his individual capacity, the defendant would be a competent witness as to all matters material to the issue. It would be the privilege of the defendant *Rich*, for instance, to give personal testimony that before the death of the *Dingley Brothers* he had paid the Robbins judgment in full, but under the provisions of section 112 of chapter 84 of the Revised Statutes, the fact that the plaintiff brings the action as the representative of a deceased party precludes the defendant from giving any such evidence in his own behalf, although Robbins, the judgment creditor, would be a competent witness for the plaintiff. Under the operation of such a rule any person could effectually close the mouth of his adversary as a witness by assigning his claim to an administrator of some estate.

But it has been seen that the ruling of the presiding judge to which exceptions were taken fails to specify whether the judgment was ordered in favor of the plaintiff in his individual or representative capacity. But it is not alleged in

the declaration that the cause of action accrued to the estate which he represented, but for aught that appears it may have been one accruing to him in his own right. The words describing him as administrator of the estate may therefore be stricken out as merely *descriptio personae*, and he may be allowed to take judgment in his individual capacity: *Bragdon v. Harmon*, 69 Me. 29; *Fleming v. Courtenay*, 95 Me. 128, 49 Atl. 611, 98 Me. 401, 99 Am. St. Rep. 414, 57 Atl. 592.

Inasmuch, therefore, as the plaintiff is entitled to judgment in his individual capacity, the entry in the first case must be, exceptions overruled.

324 The second case, *Hayes v. Rich*, is also an action of debt on a judgment. It appears that Rich commenced an action against Hayes, administrator, and became nonsuit. Judgment for costs was accordingly rendered in favor of Hayes for three hundred and seventy-eight dollars and ninety-seven cents. This judgment properly belonged to Hayes in his own right, and in this action on that judgment he is entitled to recover in his individual name and capacity: *Buswell v. Eaton*, 76 Me. 392; *Titonic Nat. Bank v. Turner*, 96 Me. 380, 52 Atl. 793.

In this case, therefore, the entry must also be, exceptions overruled.

For Authorities bearing upon the principal case, see Rich v. Hayes, 101 Me. 324, post, p. 321. The setting off of one judgment against another is the subject of a note to Coonan v. Loewenthal, 109 Am. St. Rep. 137.

RICH v. HAYES.

[101 Me. 324, 64 Atl. 656.]

EXECUTORS AND ADMINISTRATORS—Setoff in Favor of.—An administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime, purchased by such administrator with the funds of the estate for that purpose, after the death of the intestate. (p. 325.)

EXECUTORS AND ADMINISTRATORS—Setoff in Favor of.—If an executor or administrator sues for a debt created to him since the death of the decedent, the defendant in such suit cannot set off a debt due to him from the decedent, and the same rule applies against the personal representative when he is the defendant. (p. 325.)

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SETOFF Against Estates of Deceased Persons.—Demands on which causes of action arise subsequently to decedent's death are not proper subjects of setoff against demands or causes of action arising in decedent's lifetime. (p. 326.)

SETOFF Against Estates of Decedents.—Claims against an estate purchased after his death cannot be set off in an action against the purchaser thereof for a debt due the decedent, nor even on a debt created after the death of the decedent. (p. 326.)

Williamson & Burleigh, for the plaintiff.

G. W. Heselton and Heath & Andrews, for the defendant.

326 WHITEHOUSE, J. The question involved in this case arises upon the motion of the defendant to set off against the judgment recovered by the plaintiff in this case two judgments recovered by the defendant against the plaintiff. The case comes to this court on report.

In October, 1904, the plaintiff obtained a verdict of two thousand and ninety-three dollars and twenty-five cents against the defendant in his capacity as administrator de bonis non on the estate of Dingley Brothers. The action which terminated in this result was commenced April 9, 1900, on a note given by the plaintiff to Dingley Brothers in 1894 for three thousand dollars. A motion to set aside the verdict was overruled by the law court, and the case went to judgment in October, 1905.

Thereupon a motion was made to offset against this judgment, pro tanto, the judgment which might be rendered in favor of the defendant Hayes in two cases then pending in his name as administrator against the plaintiff Rich. The first of these cases was an action of debt on a judgment for seven hundred and eight dollars and sixty-five cents, recovered in 1899 by Albert Robbins against the defendant Rich.

It is alleged in the declaration that February 10, 1900, Robbins, for a valuable consideration, assigned this judgment "to Alvah R. Hayes, then the administrator de bonis of the Dingley Brothers estate." In support of this allegation the following instrument signed by Robbins was offered in evidence: "For a valuable consideration, in a note of one hundred and fifty dollars payable to F. B. Dingley, admr. d. b. n. Dingley Bros.' estate, dated Feb. 1, 1899, to me this day surrendered by A. R. Hayes, admr. d. b. n. of same estate, I assign and transfer to said estate the within judgment debt with full power in my name but without expense to me to collect the same."

It is contended in behalf of the defendant that if the action is maintainable at all the plaintiff is not entitled to recover in his representative capacity as administrator of the estate of Dingley Brothers, but only in his individual capacity. This question came before the court in *Hayes v. Rich*, 101 Me. 314, ante, p. 314, 64 Atl. 659, and upon the reasons and authorities there adduced it was held that the plaintiff ³²⁷ was entitled to recover only in his individual capacity and judgment was entered accordingly.

The second case, *Hayes v. Rich*, was also an action of debt on a judgment. It appears that Rich commenced an action against Hayes, administrator, and became nonsuit. Judgment for costs was accordingly rendered in favor of Hayes for three hundred and seventy-eight dollars and ninety-seven cents. It was held by the court that this judgment properly belonged to Hayes in his own right, and that in this case also he was only entitled to recover in his individual name and capacity: *Hayes v. Rich*, 101 Me. 314, ante, p. 314, 64 Atl. 659.

It is provided by section 77 of chapter 84 of the Revised Statutes as follows: "In actions against executors, administrators, trustees or others in a representative capacity, they may set off such demands as those whom they represent might have set off in actions against them; but no demands, due to or from them in their own right, can be set off in such actions."

Inasmuch as it has been shown by the court in *Hayes v. Rich*, 101 Me. 314, ante, p. 314, 64 Atl. 659, that the two judgments there rendered in favor of Hayes properly belonged to him in his own right, and as the new judgments have accordingly been awarded to him in his individual capacity, it follows that by the express terms of the statute above quoted these judgments could not have been set off against Rich's note in suit before judgment. Neither could the executions on these judgments be set off under the provisions of section 27 of chapter 86 of the Revised Statutes, since the creditor in one is not debtor in the other "in the same capacity and trust." Indeed, the right to set off judgments in this state is not derived from any express statutory regulations, but depends upon the general jurisdiction and power of the courts over suitors at common law; but if the right to set off, in the manner proposed, assigned claims that are not negotiable, was recognized as existing at common law, it is remarkable that the legislature should prohibit its exercise before judgment, when the setoff could be made with at least equal convenience.

It is no less significant that the provision for offsetting executions should be limited to cases where "the creditor in one is debtor in the other in the same capacity and trust"; for ordinarily the right of the court to set off judgments ³²⁸ can only be exercised when the executions could be set off under the statute: *New Haven Copper Co. v. Brown*, 46 Me. 418. In this case it should be observed that the "assigned claim" was a negotiable promissory note.

In *Ames v. Bates*, 119 Mass. 397, the facts were strikingly similar to those at bar, and although the decision of the case turned upon another point, the following observations of the court are worthy of consideration: "If Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another when he could not have set off the claims upon which the judgments were founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that it is not just that one should be encouraged, instead of paying his own debt, to seek out claims against his creditor in order thus to change the position of parties pendente lite, and this reason is equally applicable to judgments which may afterward be obtained upon such claims."

In the case at bar, it is true, the assigned judgment was not purchased pendente lite, but about two months before the commencement of the original suit of *Rich v. Hayes*. It is manifest, however, from the history of these transactions disclosed by the evidence that both Hayes and his predecessor in the administration of the estate apprehended the suit by Rich on his three thousand dollar note, and having an opportunity to purchase the Robbins judgment at less than twenty cents on the dollar, obtained the assignment of it for the express purpose of claiming a setoff, pro tanto, against the note in suit or any judgment that Rich might recover upon it.

It is undoubtedly true that the principle of mutuality is implied in the use of the word "setoff," and that it is not necessarily confined to a nominal mutuality indicated by the record, but in some cases may be a real mutuality of the indebtedness of the parties at the time of the commencement of the suit: *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458, 53 Atl. 837, and cases cited.

But if it be conceded in the case at bar that the Robbins judgment was purchased by Hayes with funds belonging to the estate of Dingley ³²⁰ Brothers, and that the assignment, although in terms made "to the estate" and not to any person, was procured for the purpose of vesting the title thereto in Hayes as the legal representative of the estate, and making it a part of the assets of the estate, still in a broader view of the precise question here presented, irrespective of the provisions of the statute, there appear to be convincing reasons and an overwhelming weight of authority in support of the plaintiff's contention that an administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime purchased by the administrator with the funds of the estate for that purpose after the death of his intestate. Some of these reasons are stated and authorities cited in *Hayes v. Rich*, 101 Me. 314, ante, p. 314, 64 Atl. 659. The question involved in the two cases are so blended or intimately connected, that the considerations controlling the decision of the one will be found in most respects equally important in the other.

It is a self-evident proposition, in the first place, that Hayes can certainly have no greater right to offset a judgment against Rich, purchased by him from a stranger after the death of Dingley Brothers, than he would to offset a judgment obtained by him, for instance, on an account for goods of the estate sold by him to Rich; and since the essence of the doctrine of setoff is its mutuality, it is equally axiomatic that if Rich could not offset against the Robbins judgment a debt due him from the estate, neither can Hayes set off a debt due him as administrator against a claim due Rich from the estate. It would obviously be immaterial whether the motion for a setoff was made by Rich or Hayes. In *Dale v. Cooke*, 4 Johns. 11, Chancellor Kent, speaking for the court, says: "It is an established rule in courts of law that if executors sue for a debt created to them since the testator's death, defendant cannot set off a debt due to him from the testator. I see no reason why the same rule should not prevail in equity. If the defendant could not set off in such a case, neither could the executor, if he was the defendant, for the rule must be mutual": See, also, *Dudley v. Griswold*, 2 Bradf. (N. Y.) 24; *Mead v. Merritt*, 2 Paige, 402; *Root v. Taylor*, 20 Johns. 137.

³²⁹ Indeed, this seems to be substantially a uniform rule in this country. In *Dayhuff v. Dayhuff's Admr.*, 27 Ind. 158, the defendant sought to set off a claim due him against the administrator's claim against him for goods of the estate sold him; and although there was evidence that the administrator agreed to allow the setoff as an inducement to the defendant to purchase the goods, the court declared it to be a settled rule that in a suit by an administrator for a debt due the estate of the decedent originating after the death of the intestate the defendant cannot set off a debt due him from the intestate before his decease. In this case the suit was by the plaintiff in his representative capacity, but this fact was held to be immaterial. The case was expressly affirmed in *Harte v. Houchin*, 50 Ind. 327; *Minor v. Minor's Admr.*, 8 Gratt. 1; *Cook v. Lovell*, 11 Iowa, 81; *Aiken v. Bridgman*, 37 Vt. 249; *Wisdom v. Becker*, 52 Ill. 342; *Lee v. Russell*, 18 Ky. Law Rep. 951, 38 S. W. 874; *Grew v. Burditt*, 9 Pick. 265; *Lamberton v. Freeman*, 16 N. H. 547; 25 Am. & Eng. Ency. of Law & Pr., 2d ed., 534, and cases cited.

In 18 *Cyclopedia of Law and Procedure*, 896 et seq., the rule upon this question is thus formulated: "Demands on which causes of action arise subsequent to decedent's death are not proper subjects of setoff against demands or causes of action arising in decedent's lifetime, because there is no mutuality of indebtedness between the parties."

On page 899 of the same volume is the following rule: "Claims against an estate purchased after decedent's death cannot be set off in an action against the purchaser thereof for a debt due the decedent, nor even a debt created after the death of a decedent."

Both of these propositions are supported by numerous citations of authorities, basing the rule for the most part upon considerations of sound public policy, which require the estate to be settled as of the time of the decease of the intestate and forbid any alteration in the course of the distribution of the assets': See, also, *Irons v. Irons*, 5 R. I. 264; *Union Nat. Bank v. Hicks*, 67 Wis. 189, 30 N. W. 234; *Bizzell v. Stone*, 12 Ark. 378. In the last-named case the same rule was held to be settled both at law and in equity, and whether the estate be solvent or insolvent.

In like manner it appears to have been uniformly held by the ³³¹ courts of England, that if an administrator brings

an action upon a debt created against the defendant after the death of the intestate or upon which the cause of action arose after that event, the defendant cannot set off a debt on which there was a cause of action in the lifetime of the intestate': *Shipman v. Thompson*, Will. 103; *Tegetmyer v. Lumley*, Will. 264; *Watts v. Rees*, 9 Ex. 696, 11 Ex. 410; *Lambard v. Elder*, 17 Beav. 542.

As stated by the court in *Hayes v. Rich*, 101 Me. 314, ante, p. 314, 64 Atl. 659: "It appears that at the time Hayes purchased the Robbins judgment, Rich was hopelessly insolvent and had no available property with which to satisfy any judgment, except the note in suit in *Rich v. Hayes*, while, on the other hand, there is no evidence that Robbins was not entirely solvent and able to pay the note for one hundred and fifty dollars which the plaintiff held against him. It was the obvious duty of the plaintiff, if acting for the interest of the estate which he represented, to collect this note in cash, and not invest it in a worthless judgment at twenty cents on the dollar."

Inasmuch as the attorneys for Rich have a common-law lien upon the judgment which they have against Hayes personally for their costs of suit, it is not claimed that either of the judgments in *Hayes v. Rich* can be offset against that; and upon the reasons and authorities above presented it is the opinion of the court that Hayes is not entitled to have either of his judgments offset against the judgment for two thousand and ninety-three dollars in favor of Rich. Judgment must accordingly be entered in favor of Rich for both damages and costs without the setoff claimed.

Motion denied.

The Setting Off of One Judgment against another is the subject of a note to Coonan v. Loewenthal, 109 Am. St. Rep. 137. See, also, *Hayes v. Rich*, 101 Me. 314, ante, p. 314.

JONES v. JONES.

[101 Me. 447, 64 Atl. 815.]

APPELLATE PRACTICE—Bills of Exceptions—What Must State.—An excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the bill of exceptions to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. It is not enough that the court can find these characteristics by studying the report of the evidence in support of the motion for a new trial when it accompanies the bill of exceptions, unless it is made part thereof. (p. 329.)

BILLS AND NOTES—Delivery.—A note does not become a liability until delivery. (p. 331.)

BILLS AND NOTES—Delivery to Agent—Death of Maker.—If the maker of a note places it in the hands of a third person merely for delivery to the payee, such third person is the agent of the maker, and not of the payee, and if the maker dies before delivery by the agent, his authority is thereby revoked and a subsequent delivery by him is ineffectual to create a liability. (p. 331.)

BILLS AND NOTES—Delivery on Happening of Contingency—Burden of Proof.—If a note is left with a third person to be delivered to the payee upon the happening of a contingency, the first delivery is complete and irrevocable, but the burden of proving such delivery is upon the person setting it up. (p. 332.)

PARTNERSHIP—Loan to Member of Firm—Recovery as Money had and Received.—If a third person, by mortgage or otherwise, procures money and furnishes it to a person for the use of a partnership of which he is a member, he, as a member of such firm, becomes bound in equity and good conscience to repay such debt and such loan may be recovered as for money had and received, unless all or some part of it is barred by limitation and as to the part not so barred recovery may be had. (p. 333.)

L. C. Stearns, T. D. Bailey and J. F. Gould, for the plaintiff.

P. H. Gillin and Martin Cook, for the defendants.

450 SAVAGE, J. Action to recover on three promissory notes, one dated February 17, 1896, for fifteen hundred dollars; one dated April 14, 1900, for five hundred dollars; and one dated February 8, 1901, for five hundred dollars, all purporting to be signed on the face by Silas D. Jones & Sons, and on the back by Silas D. Jones, individually, and payable to the plaintiff. There is also a count for money had and received. The action is against the estate of Silas D. Jones, of whose will the defendants are the executrices. The defendants deny the execution of the notes, and particularly that

the individual signature of Silas D. Jones is genuine; they pleaded the statute of limitations as to the fifteen hundred dollar note; they claim that the notes never became effective for want of delivery during the lifetime of Silas D. Jones and they assert that the plaintiff, having come into possession of the notes after the death of Silas D. Jones, voluntarily forgave the indebtedness, surrendered the notes to the executrices and consented to their destruction, in consideration of the promise of Sarah C. Jones that she would not thereafter change the provisions of her will in favor of the plaintiff's husband, who was the son of Sarah C. Jones.

Nevertheless, the jury returned a verdict for the plaintiff for the full amount claimed. And the case now comes before us on the defendants' motion and exceptions. Of the many exceptions, only one—that relating to the delivery of the notes—is open to consideration. Many times the court has reiterated the rule that an excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the bill of exceptions to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. The bill of exceptions must show what the issue was, and how the excepting party was aggrieved. Error must appear affirmatively: *Dennen v. Haskell*, 45 Me. 430; *Hovey v. Hobson*, 55 Me. 256; *Merrill v. Merrill*, 67 Me. 70; *Fairfield v. Old Town*, 73 Me. 573; *Johnson v. Day*, 78 Me. 224, 3 Atl. 637; *Nutter v. Taylor*, 78 Me. 424, 6 Atl. 835; *Smith v. Smith*, 93 Me. 253, 44 Atl. 905, and many other cases. The bill of exceptions in this case, except in one instance to be considered later, is ⁴⁵¹ barren of statements to show that the matters complained of were material, or erroneous or harmful. It is not enough that the court can find all of these characteristics by studying the report of the evidence in support of the motion for a new trial, when it accompanies a bill of exceptions. The bill must be strong enough to stand alone. The court, in considering the exceptions, cannot travel outside of the bill itself. In this respect the court cannot consider the report of the evidence nor the charge of the presiding justice, unless they are made a part of the bill of exceptions. They are not so made in this case.

It will not be necessary to consider all of the questions argued by counsel. If we assume that the signature of Silas D. Jones upon the notes was genuine, and that the sur-

render of the notes by the plaintiff was procured by falsehood and fraud, as she now claims, there is still an insuperable difficulty in sustaining the verdict. There was sufficient evidence to warrant the jury in finding that Silas D. Jones negotiated loans at a savings bank on the days and for the respective amounts for which the notes in suit were given; that the first loan was obtained upon the note of Storer W. Jones, plaintiff's husband, and the second and third loans upon the notes of the plaintiff and her husband, all secured by the plaintiff's mortgages of her own real estate; that the first two loans were procured for the use of the firm of Silas Jones & Sons, of which Silas D. Jones was a member, and the third for the use of Silas D. Jones' Sons, after Silas D. Jones had retired from the original firm; and that Storer W. Jones was a member of both firms. Upon the assumptions above stated, the jury might properly find, also, that the notes in suit were intended by the makers to be collateral security for the liability of the plaintiff incurred by giving her notes and mortgages. This is what the plaintiff claims. We think, too, that a verdict based upon the inference that the notes were given as a direct liability in consideration of money procured by the plaintiff for the firm could not in that respect have been disturbed. In such case it would have been expected that the plaintiff was to pay the bank loans, and the signers of the notes in suit to pay them to the plaintiff.

⁴⁵² But the defendants contend that, whatever may have been the inception of these notes, they were not delivered to the plaintiff in the lifetime of Silas D. Jones; that so far as the individual liability of Silas D. Jones was concerned, they were left by him in the hands of Storer W. Jones, who, as a member of the firm, was also one of the makers, to be delivered to the plaintiff; that Storer was the agent for that purpose of Silas, and that Storer's authority to make delivery was revoked by the death of Silas, before delivery. It is not in dispute that Silas D. Jones died August 9, 1903, and that the notes were not delivered into the possession of the plaintiff until the following September. And it is admitted that the plaintiff was in entire ignorance of the existence of the notes until a week or two before the death of Silas, when she says she first learned of it from her husband. And it does not appear that there had ever been any agreement or

understanding on her part that notes should be given to her on account of the bank loans.

It is of course well settled that a promissory note does not become a liability until delivery. It is likewise true that when the maker places the note in the hands of a third person merely for delivery to the payee, such third person is the agent of the maker, and not of the payee. And if the maker dies before delivery by the agent, the agent's authority is thereby revoked, and a subsequent delivery by him is ineffectual to create a liability. The plaintiff does not dispute the principles thus stated, but she attempts to meet and parry them by another well-established doctrine, and that is, that when a deed or other instrument, whose validity depends upon delivery, is left with a third person to be delivered to the grantee, or in case of a note, the payee, on the happening of a contingency, the first delivery is complete, and irrevocable by death or otherwise: See *Hammon v. Hunt*, Fed. Cas. No. 6003, 4 Ban. & A. 411. Sometimes this doctrine is explained by saying that the depositary, in such case, holds in trust for the payee until the happening of the contingency, and that a delivery to the trustee is upon general principles as effectual as a delivery to the cestui would be. The contention of the plaintiff is that the notes were made "as collateral security for the mortgages placed by her upon her property for the benefit of the firm," and that the delivery ⁴⁵³ of the notes to the payee "was to be conditioned upon the happening of a contingency," which contingency was the failure of the makers of the notes "to take care of the mortgages placed for their benefit by the plaintiff upon the property." And assuming this contention to be supported by proof, and showing the contingency had happened, her counsel argue upon the principle of law above stated, that the authority of Storer W. Jones to deliver the notes was not revoked by the death of Silas D. Jones, and that upon such delivery after his death, the notes became liabilities of his estate; and, further, that although the fifteen hundred dollar note was then upon its face more than six years overdue, yet it was not barred by the statute of limitations, because that statute did not begin to run until the note first became a liability, namely, at delivery to the plaintiff.

If, in face of the apparent want of delivery in the lifetime of Silas, the plaintiff would obtain the benefit of the rule

she relies upon, it is incumbent upon her to show that when Silas D. Jones left the notes in the hands of Storer for delivery to her, that delivery was intended to be conditional upon the happening of a contingency. Unfortunately for her theory we are unable to find the proof which sustains her burden. The only contingency suggested was the failure of the makers of these notes to take care of the bank loans, and pay the interest when due. But why does the plaintiff say that the depository held these notes to be delivered only upon the happening of this particular contingency? Apparently because this one fits her case. There is no evidence that Silas D. Jones left these notes in the hands of his son to be delivered only upon the happening of any contingency. We know nothing of his particular intention or purpose, or directions further than that it may be inferred that he intended the notes to be delivered. We know nothing whatever about these notes until they are found in the possession of Storer, shortly before the death of Silas. We can only conjecture, and conjecture is not proof: *McTaggart v. Maine etc. R. R. Co.*, 100 Me. 223, 60 Atl. 1027. If we might conjecture, we should say that if the notes were intended as security for the liability the plaintiff had incurred, it would be more reasonable to think that the security was intended to become effective from the time her liability attached, than upon the happening⁴⁵⁴ of some future contingency. The plaintiff was liable all the time. Why should she not have been secured all the time? We do not think any legitimate inference can be drawn from the record that the delivery of these notes was to be conditioned upon the happening of a contingency. And therefore the plaintiff must fail as to this contention.

But the plaintiff claims further that there was a constructive delivery of the notes before the death of the maker. She says her husband informed her that he had these notes in his possession a short time before his father's death. We do not need to discuss the effect of a constructive delivery to create a liability upon the notes, for we are unable to persuade ourselves that the mere fact that her husband told her that such notes were in existence, and nothing more, can be regarded as a constructive delivery of them to her.

We conclude, therefore, that the plaintiff was not entitled to retain a verdict based upon the notes. We turn now to the count for money had and received. If the plaintiff, by

mortgage or otherwise, procured money and furnished it to Silas D. Jones for the use of a firm of which he was a member, and there is evidence that she did, then he as a member of the firm became bound in equity and good conscience either to pay her or pay her debt. If he did not do the one, he ought to do the other. And we think she might recover for money had and received.

But there are difficulties here, also. In the first place, the claim for the fifteen hundred dollars arose when the firm became indebted to her to that amount in 1896, and that claim became barred by the statute of limitations, even before the death of Mr. Jones. In the next place, the evidence in the case, such as it is, raises the inference, we think, that the third loan was procured for, and received by the firm of Silas D. Jones' Sons, and not for the firm of Silas D. Jones & Sons, Silas D. Jones having gone out of the firm several months before the loan was procured. The verdict for the full amount of the loans and interest was excessive, therefore, even if based upon the count for money had and received.

And in the absence of special findings by the jury, the last difficulty is that we have no means of knowing whether they founded ⁴⁵⁵ their verdict upon the notes, in which case it was wholly wrong, or upon the count for money had and received, in which case it might be only excessive. From the amount of the verdict we incline to think that it was based upon the notes themselves. Under the instruction of the court, upon the undisputed evidence, the jury might well find a perfected and valid delivery of all the notes.

Although the motion to set aside the verdict must be sustained, it is expedient to examine the defendants' one exception that is open to consideration. The jury were instructed to the effect that if the notes had been delivered as completed instruments by Silas D. Jones to Storer (one of the members of the firm) to deliver to his wife, "that delivery might be perfected, even after the death of Silas." While such an instruction, as we have seen, might be correct under some circumstances, and a delivery to an agent for future delivery to the payee upon the happening of a contingency might be effective, yet we think, as applied to the evidence in this case, the rule given without limitation or qualification must be deemed to be exceptionable error.

Motion and exceptions sustained.

A Negotiable Instrument has no legal inception or valid existence as such, as a rule, until delivered in accordance with the purpose and intention of the parties: *Purviance v. Jones*, 120 Ind. 162, 16 Am. St. Rep. 319; *McCormick etc. Machine Co. v. Faulkner*, 7 S. Dak. 363, 58 Am. St. Rep. 839. As to the effect of putting negotiable paper in circulation in violation of instructions or conditions, see the note to *Bedell v. Herring*, 11 Am. St. Rep. 314.

MAY v. PENNELL.

[101 Me. 516, 64 Atl. 885.]

SUICIDE—Attempt to Commit.—In the absence of an express statute an attempt to commit suicide is not an indictable offense. (p. 339.)

W. H. Connellan, for the plaintiff.

⁵¹⁶ **WHITEHOUSE, J.** The petitioner was indicted in the superior court for Cumberland county for the alleged crime of attempting to commit suicide, and upon conviction was sentenced at the May term, 1906, to imprisonment at labor in the county jail for the term of eleven months. Thereupon he presented to a single justice his petition ⁵¹⁷ for a writ of habeas corpus, to obtain a release from imprisonment on the ground that the act charged in the indictment is not a crime in this state, and that the sentence inflicted upon him was not warranted by law. The justice overruled this contention pro forma, and refused to discharge the petitioner. The case comes to the law court on exceptions to this ruling.

By the early common law of England suicide was ranked among infamous crimes and held to be a "species of felony." It was punished by a forfeiture to the king of the goods and chattels of the *felo de se*, and an ignominious burial in the highway with a stake driven through his body: 4 Blackstone's Commentaries, 189. But aside from the mental suffering which might thus be inflicted upon innocent surviving relatives of the suicide by a desecration of his body, it was not in the power of human tribunals to impose any other punishment than the forfeiture of his estate; and "since forfeitures for crime are not practiced in our states," says Mr. Bishop, "suicide is not practically an offense with us": Bishop on Criminal Law, 1, sec. 512, 2, sec. 1187. No case has been

brought to the attention of the court in which it has been held in any of the United States that suicide is a punishable offense. Although it may be deemed ethically reprehensible and inconsistent with the public welfare, it has never been declared by the legislature or held by the court of this state, to be such a public wrong as will subject the doer to legal punishment. Section 1 of chapter 136 of the Revised Statutes declares that "when no punishment is provided by statute, a person convicted of an offense shall be imprisoned for less than one year or fined not exceeding five hundred dollars." But even if suicide is deemed to be criminal as *malum in se*, neither of the penalties specified in this statute can be inflicted upon one whose life is ended.

Nor is there any statute in this state which constitutes an attempt to commit suicide a substantive offense or makes it subject to legal punishment. Section 9 of chapter 132 of the Revised Statutes provides as follows: "Whoever attempts to commit an offense, and does anything toward it, but fails, or is interrupted, or is prevented in its execution, where no punishment is expressly provided for such attempt, shall, if the offense thus attempted is punishable with imprisonment for life, be ⁵¹⁸ imprisoned for not less than one, nor more than ten years; and in all other cases he shall receive the same kind of punishment that might have been inflicted if the offense attempted had been committed, but not exceeding one-half thereof." But here again it is obvious that cases of suicide were not within the contemplation of the legislature in the enactment of this statute. As no penalty of any kind is attached to suicide if actually committed, there could be no punishment whatever by force of this statute for an attempt to commit it.

In the absence of any statute in this state expressly making an attempt to commit suicide a punishable offense, it is therefore difficult to discover any satisfactory ground upon which the sentence in this case can rest; for it would appear to be a palpable solecism in the law to declare that a mere attempt to commit an act which is not penal is itself punishable.

It is suggested, however, that inasmuch as suicide was a "species of felony" by the common law of England, and an attempt to commit suicide was there held to be a misdemeanor, it became incorporated in the common law of Massachusetts as a substantive offense, and in this state is subject to the

provisions of section 1 of chapter 136 of the Revised Statutes above quoted, declaring that "when no punishment is provided by statute, a person convicted of an offense shall be imprisoned less than one year, or fined, etc."

The only English cases that have been cited in any of the text-books or cyclopedias as authority for the doctrine that an attempt to commit suicide was a misdemeanor by the common law of England are *Regina v. Doody*, 6 Cox C. C. 463, and *Regina v. Burgess*, 9 Cox C. C. 247. The former case is simply the report of a *nisi prius* ruling at a trial, in which the prisoner was not defended by counsel. In the latter case the defendant pleaded guilty, and the question reserved for the court of criminal appeals was primarily one of jurisdiction. It was contended in behalf of the defendant that an attempt to commit suicide was an attempt to commit murder within the meaning of chapter 100 of 24 and 25 Victoria, and hence was not within the jurisdiction of the county assizes; but the court held that though suicide was deemed a felony in England, it was not murder within the meaning of the act named, and that the attempt to commit ⁵¹⁹ suicide was a misdemeanor and within the jurisdiction of that court; but sentence was respited.

"An attempt," says Mr. Bishop, "is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing of it": 1 Bishop on Criminal Law, sec. 728; while a substantive offense is one depending on itself alone and not on another offense to be first established by the conviction of the person who directly committed it": 1 Bishop on Criminal Law, sec. 696. It is not claimed that the attempt to commit suicide was ever made a substantive offense by any act of the British parliament, and there is no suggestion in the brief oral utterances of the judges in the English cases above cited that the misdemeanor of which the defendant was in each instance there convicted was other than the ordinary attempt to commit a punishable felony; it is not suggested that it was a substantive offense by the law of England. If the accomplished act of suicide had not been a punishable crime, the attempt to commit the act could not have been held to be a punishable misdemeanor. For it has been seen that an attempt involves an "intent to do a particular thing which the law declares to be a crime," and the word "crime" or

"offense," as ordinarily used in legislative enactments by text-writers on criminal law and in the practical administration of it by the courts, uniformly signifies a public wrong which subjects the perpetrator to legal punishment: Standard Dictionary; 1 Bishop on Criminal Law, 32. In accordance with this view is the statement of Mr. Bishop, as above shown, that suicide is "not practically an offense with us." But an attempt to commit an act which is not "practically a crime" is not itself "practically criminal," because not punishable. In Massachusetts forfeitures were abolished by the "Body of Liberties" of 1641, the statute providing for an ignominious burial of the suicide fell into disuse at the close of that century and the colony act of 1660 was repealed in 1823. Thus the common law of England upon this subject was modified in Massachusetts, and suicide ceased to be a punishable offense. The groundwork for the English doctrine that an attempt to commit it was a misdemeanor was thus removed. If it was a misdemeanor by the common law of England, it ceased to be such under the law of ⁵²⁰ Massachusetts and has never been recognized as a part of the common law of Maine. "Reason is the soul of the law," says Lord Coke, "and when the reason changes the law also changes": 7 Coke, 7. Although there have been attempts to commit suicide in great numbers in the history of both Massachusetts and Maine, in no instance which this court has been able to discover has there been a conviction of such an attempt before any court prior to the case at bar.

In *Commonwealth v. Dennis*, 105 Mass. 162, it was distinctly held that "an attempt to commit suicide was not an indictable offense in that commonwealth"; but the decision rests upon the construction of their statutes, which, however, are in substance and effect precisely like our own. In the opinion the court say: "In this commonwealth the whole matter of punishments for all attempts to commit an offense prohibited by law, where no express provision is otherwise made, has been subject to revision by statute." After stating the provision of the statute in terms like section 9, chapter 132 of our statutes above quoted, the court add: "The attempt to commit suicide is thus left without punishment, because the act itself could never be punished by any of the modes stated. By a well-established rule of the construction of statutes, the common law is held to be repealed by implication, when the

whole subject has been revised by the legislature: *Commonwealth v. Cooley*, 10 Pick. 37; *Commonwealth v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Lakin v. Lakin*, 2 Allen, 45. This rule requires us to look to the statute alone for the punishment, if any, affixed to the act here indicted. If it is not there made punishable, it is enough, whatever the reason which induced its omission. The end of punishment is the prevention of crime, and it may have been thought at least impolitic to punish an attempt to do that which is itself punishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed."

It is true that in *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109, it was held that suicide must still be deemed criminal as *malum in se*, and although an attempt to commit suicide is not punishable, yet a person who, in attempting to commit it accidentally kills another who is trying to ⁵²¹ prevent its accomplishment is guilty of manslaughter. But Chief Justice Gray, who drew the opinion in the latter case, appears to have concurred in the former, and expressly states in his opinion that "the conclusion reached in *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109, is not affected by the fact that the legislature having in the general revision of the statutes measured the degree of punishment prescribed for attempts to commit offenses by the punishment prescribed for such offense if actually committed, has intentionally or inadvertently left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner"; citing the former case of *Commonwealth v. Dennis*, 105 Mass. 162.

The question arose under the Penal Code of Hawaii in 1868, upon a demurrer to an indictment for an attempt to commit suicide, and the demurrer was sustained and the indictment quashed. In the opinion of the court published in 2 *American Law Review*, 794, Chief Justice Allen says in conclusion: "The wisdom of legislative power has never deemed it wise to make a provision to apply to the act charged against the defendant, and we are of opinion that we should be slow to give an entirely new construction to the code concerning murder, and to impose a punishment never contemplated, and of the wisdom of which the framers of the law have not yet expressed a favorable opinion. . . . We

find no statute of any country nor any provision of the common law which will sustain this indictment."

By section 178 of the Penal Code of New York, however, enacted in 1881, "Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years or by fine not exceeding one thousand dollars, although no forfeiture is imposed in the case of the "successful perpetrator." These sections of the New York code are incorporated in the codes of North and South Dakota. But these provisions appear to have fallen into utter disuse; for we have been unable to find any reported convictions for this offense in either state since the adoption of this code. And although there have doubtless been innumerable attempts to commit suicide in the United States, no instance has been discovered in which there has been a conviction for this offense on ⁵²² either statutory or common-law grounds, prior to that in the case at bar.

It is accordingly the opinion of the court that an attempt to commit suicide is not an indictable offense in this state, and that entry should be, exceptions sustained.

Prisoner discharged.

Suicide is not generally regarded as a crime, although some authorities seem to regard an attempt to commit suicide as a public offense: *Darrow v. Family Fund Society*, 116 N. Y. 537, 15 Am. St. Rep. 430; *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224; *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206.

BROWN v. SMITH.

[101 Me. 545, 64 Atl. 915.]

EXECUTORS AND ADMINISTRATORS—Limitation of Power.

The power and authority of an administrator or executor over the estate of the deceased is confined to the sovereignty by virtue of whose laws he is appointed. (p. 340.)

EXECUTORS AND ADMINISTRATORS—Foreign Decedents—Ancillary Administration.—If assets of a foreign decedent are found within the state, ancillary administration must be obtained therein for the protection of resident creditors, before the courts of such state will enforce the recovery of debts due the foreign decedent. (p. 342.)

ADMINISTRATORS—Foreign—Assignment of Mortgage.—An administrator in one state cannot, by virtue of letters granted in another state, assign a mortgage of land situated in the first-named state, so as to enable the assignee to enforce payment thereof. (p. 342.)

F. W. Brown, Jr., and W. H. McLellan, for the plaintiff.

R. F. Dunton and W. P. Thompson, for the defendant.

546 POWERS, J. Writ of error to recover certain lands in Thorndike. The case comes here on report.

To make out title plaintiff introduced (1) a duly recorded mortgage of the demanded premises from Albert D. Bumps, of Thorndike, Maine, to George Tyler, of Boston, Massachusetts, dated May 28, 1887, given to secure a certain execution and judgment recovered by said Tyler against said Bumps in this court in said Waldo county; (2) copies of records of the probate court of Middlesex county, Massachusetts, showing that December 10, 1889, Isabella J. Tyler of Waltham, in the county of Middlesex, was duly appointed administratrix **547** of the estate of George Tyler, late of said Waltham, deceased; (3) assignment from said administratrix to the plaintiff of said mortgage, duly recorded and dated November 21, 1904. This makes a prima facie case, if an administratrix appointed in another state has power to assign a mortgage given to her intestate upon real estate in this state.

It is a well-settled principle of the common law that the power and authority of an administrator or executor over the estate of the deceased is confined to the sovereignty by virtue of whose laws he is appointed. In recognition of this principle provision is made by our statutes for the granting of ancillary administration on the estate of nonresidents, who die leaving estate to be administered in this state, or whose estate is afterward found therein: Rev. Stats., c. 65, sec. 7, c. 66, secs. 14-16.

One reason at least upon which this rule is founded is to prevent the effects or credits of the deceased found in any state which may be needed to satisfy debts due to the citizens of that state from being withdrawn from its jurisdiction. That no such necessity in fact exists can never be known with certainty in any given case unless administration is granted, and an opportunity thereby afforded to creditors to present their claims: *Mansfield v. McFarland*, 202 Pa. 173, 51 Atl. 763. It is said in *Stearns v. Burnham*, 5 Me. 261, 17 Am. Dec. 228, that the principles of justice and policy upon

which similar statutes to those above cited were found "would seem to lead our courts of law to that course of proceedings which would harmonize with those principles and have a manifest tendency to produce the same beneficial results." In that case it was accordingly held that an executor appointed under the laws of another state cannot indorse a promissory note payable to his testator by a citizen of this state, so as to give the indorsee a right of action here in his own name.

The debt due from Bumps, who at the time of the recovery of the judgment and ever since has been a resident of this state, constituted no part of the goods, effects, rights and credits of the intestate in Massachusetts, which alone the administratrix was authorized and empowered to administer. The debt follows the creditor while living; after his death it follows the debtor: *Saunders v. Weston*, ⁵⁴⁸ 74 Me. 85. The situs of the debt being in Maine, the administratrix, deriving her authority solely from the laws of Massachusetts, had no control over it.

There is even stronger reason for holding that she had no control over the mortgage. A mortgage and its assignment are conveyances of land in fee which must be recorded. It is desirable that title to real estate should so far as possible appear of record. The party having a right to redeem ought to be able, by an examination of the records in the registry of deeds and the probate courts of this state, to ascertain who is entitled to receive payment and give a discharge of the mortgage, without being compelled at his peril to incur the expense of searching the records of other states and countries. Without doing this the defendant in the present case could not know until the evidence was produced at the trial that the plaintiff's assignee had ever been appointed administratrix of the deceased in the place of his domicile. The courts of Massachusetts in a case which has been frequently cited and followed in that state have decided the precise point here presented against the plaintiff's contention: *Cutter v. Davenport*, 1 Pick. 81, 11 Am. Dec. 149. The question is a new one in this state; but the trend of our decisions has been to restrict the power of a foreign administrator to the jurisdiction of his appointment: *Stevens v. Gaylord*, 11 Mass. 256; *Stearns v. Burnham*, 5 Me. 261, 17 Am. Dec. 228; *Smith v. Guild*, 34 Me. 443; *Gilman v. Gilman*, 54 Me. 453; *Smith v. Howard*, 86 Me. 203, 41 Am. St. Rep. 537, 29 Atl. 1008; *Green v. Alden*, 92 Me. 177, 42 Atl. 358.

It may fairly be regarded as the settled policy of this state that, when assets of a foreign decedent are found here, ancillary administration must be obtained here for the protection of resident creditors, before our courts will enforce the recovery of debts due the foreign decedent. Otherwise the assets could be converted into money, taken outside the state, distributed under the jurisdiction of foreign courts, and our citizens compelled to go into other jurisdictions to collect their just dues. Such is the general rule: Note to Shinn's Estate, 45 Am. St. Rep. 667; *Maas v. German Sav. Bank*, 176 N. Y. 377, 98 Am. St. Rep. 689, 68 N. E. 658.

Inasmuch, therefore, as ample provision is made by our statutes for the granting of ancillary administration in this state, a course ⁵⁴⁹ which seems to be in accord with our legislative policy and judicial decisions, and may in any case be necessary for the protection of our citizens who are creditors of the estate, in view also of the fact that it is desirable so far as possible that title to real estate should somewhere appear of record in this state, we hold, in accordance with *Cutter v. Davenport* above cited, that an administrator cannot, by virtue of letters granted in another state, assign a mortgage of land situated in this state, so as to enable the assignee to enforce payment thereof: *Dial v. Gary*, 14 S. C. 573, 37 Am. Rep. 737; 18 Cyc. 1231; *Reynolds v. McMullen*, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41. The right of a foreign administrator to receive a voluntary payment and give a discharge of a debt so paid is not involved in this case.

Judgment for the defendant.

Letters of Administration have no extraterritorial operation, and do not, as a matter of right, confer authority upon the administrator to maintain a suit in another state: *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80; *Maas v. German Sav. Bank*, 176 N. Y. 377, 98 Am. St. Rep. 689. Perhaps, however, his assignee may maintain such a suit (note to Shinn's Estate, 45 Am. St. Rep. 673), except where the assignment is of a mortgage on real estate: *Dial v. Gary*, 14 S. C. 573, 37 Am. St. Rep. 737; *Reynolds v. McMullen*, 55 Mich. 568, 54 Am. Rep. 386.

**WOOD REAPING AND MOWING MACHINE COMPANY
v. ASCHER.**

GUARANTY OF PAYMENT of Promissory Note, Effect of.—The guaranty of the payment of a promissory note is absolute, and it is not necessary, if the note is not paid at maturity, for the payee to show that he has exhausted his remedies against the maker or that the latter is insolvent. (p. 345.)

No appearance for the appellee.

The note was in the following form:

"On or before the first day of September, 1902, I, ———, of Chestertown Post Office, Kent County, Md., for value received promise to pay to the order of The Walter A. Wood Mowing and Reaping Machine Co. one hundred dollars. Payable at Chestertown National Bank, Md., ¹³⁴ with interest at legal per cent per annum from September 1, 1901, until paid.
C. R. ATKINSON."

On the back of this note was written the following guaranty:

“For value received I hereby guarantee the payment of the within note. Demand for payment, protest and notice of protest waived.
MARCUS J. ASCHER.”

The signatures to the note and the guaranty were admitted, and there was evidence tending to show that the note had been given by its maker in part payment for a mowing machine sold to him by Ascher as the plaintiff's agent.

The only bill of exceptions in the record is to the rulings of the circuit court upon the prayers. The plaintiff offered one prayer which asked the court to rule as matter of law that if it appeared from the evidence that the note in question was executed by Atkinson and the guaranty thereon was executed by Ascher and the note was then passed to the plaintiff in part payment for the machine, and that no portion of the note was ever paid, then the verdict must be for the plaintiff for the amount of the note and interest, less any credits thereon to which Atkinson appeared to be entitled.

This prayer the court rejected and granted the one of the defendant, asserting that there was no legally sufficient evidence to entitle the plaintiff to recover.

We have not the benefit of any expression by the learned judge below of the views which led to his action upon these prayers, nor do we find in the record any sufficient support for that action.

No brief was filed in this court on behalf of the appellee, and the case was submitted to us by both parties without argument. It is stated, however, in the brief filed by the appellant that the judge who heard the case was of the opinion that the guaranty sued on was a conditional one, and that therefore the plaintiff's case was defective, because it had offered no evidence tending to show either the exhaustion by it of its remedies against the maker of the note before suing the guarantor or the insolvency of the maker. If such was the view of the case entertained by the judge of the circuit court, he fell into an error.

¹³⁵ The guaranty is in terms predicated upon no contingency, nor is it merely one of the collectibility of the note. It is a distinct and unequivocal guaranty of the payment of that obligation. Such a guaranty is uniformly treated by the leading text-books as an absolute one: 2 Randolph on

Commercial Paper, 2d ed., c. 26, par. 850; Daniel on Negotiable Instruments, 5th ed., p. 799; 1 Brandt on Suretyship and Guaranty, sec. 220; Stearns on Suretyship, sec. 61; 14 Am. & Eng. Ency. of Law, p. 1142, where it is said upon the authority of many cases that "the most usual form of absolute guaranty is that of payment." In *Townsend v. Cowles*, 31 Ala. 428, the court held the words "I guarantee the payment of the within" indorsed on a promissory note and signed by the defendant to constitute an absolute engagement to pay the debt when due on default of the maker, and permitted the holder of the note to recover from the guarantor without proof of having attempted to recover of the maker. In *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161, it was held that the indorsement on a note of the words "For value I hereby guaranty the payment of the within note to Cassie Hungerford or bearer" constituted an absolute guaranty. The court in that case said: "The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expresses the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of the payment of the within note imported an undertaking, without condition, that, in the event of the note not being paid according to its terms—that is, at maturity—the guarantor should be responsible. The nonpayment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid and the time when payment should be made, all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming ¹³⁶ absolute by nonpayment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the nonpayment have such effect."

The same doctrine has been asserted or recognized by this court in *Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257, *Emerson v. Aultman*, 69 Md. 125, 14 Atl. 671, and *Mitchell v. McCleary*, 42 Md. 374.

The judgment appealed from must be reversed and the case remanded for a new trial.

Contracts of Guaranty are discussed at length in the note to *Pearson Mfg. Co. v. Jeffreys*, 105 Am. St. Rep. 502. If one makes an absolute guaranty of the payment of a promissory note, in an action thereon, presentation of the note to the maker when due, request to pay, and notice to the guarantor of dishonor need not be alleged, nor is the guarantee under any legal obligation to first resort to the maker of the note or to any securities held for payment: *Fegley v. Jennings*, 44 Fla. 203, 103 Am. St. Rep. 142.

MARYLAND TELEPHONE AND TELEGRAPH COMPANY v. SIMON SONS COMPANY.

[103 Md. 136, 63 Atl. 314.]

SPECIFIC PERFORMANCE—Injunction, Bill for, When Equivalent to a Suit for.—A bill enjoining a telephone company from charging a higher rate for its telephones than is specified in a contract is equivalent to a bill for the specific performance of such contract, and the suit must be determined by the application of the same principles. (p. 349.)

TELEPHONES—Construction of Contract and Ordinance for the Furnishing of.—A contract and a municipal ordinance for the supplying of telephones means such as will furnish the most effective service then in use. (p. 351.)

AN INJUNCTION Should be Denied When Its Enforcement will Render a Service Corporation Insolvent and unable to proceed with its business. Therefore, a bill against a telephone corporation to compel it to furnish telephones and telephonic service at the rate specified in a contract and in a municipal ordinance should be dismissed and the complainants left to their remedy at law, if it is not possible to furnish the service at the rate specified and to do so will make the company insolvent and unable to perform its obligation to the public. (p. 353.)

Edgar H. Gans and William L. Marbury, for the appellant.

William S. Bryan, Jr., J. Walter Lord, John Stonewall, J. Healy and Leon E. Greenbaum, for the appellees.

138 PAGE, J. This is an appeal from a decree of the lower court restraining the appellant from exacting or requiring of the appellees a greater rate of rental than \$48 per annum for business telephones and service connections on a one party, double copper wire metallic circuit, central energy

system, with unlimited calls, and declaring that such leases are illegal and void, so far as they provide for rates in excess of the said sum of \$48 per annum; and further restraining the appellant from refusing to continue the said service so long as the appellees tender and pay therefor a rental at the rate of \$48 per annum.

Many of the legal questions affecting the cause have been heard and decided in a former appeal reported in 99 Md. 142, which arose upon demurrer to the appellees' bill. We refer to the proceedings in that case for a fuller statement of the averments of the bill, and also for the several questions that must be taken as settled here. The cause having been remanded to the lower court for further proceedings, the appellant answered the bill, and testimony was taken by each party, and the decree was rendered from which this appeal is taken. In its answer the appellant admits that it has charged for telephone service at the rates stated in the bill, but denies these rates are in excess of the amount it is entitled to charge; that ordinance No. 110 was enacted as stated in the bill, and was accepted by the appellant: that it has established a large and effective telephone system in Baltimore City to over seven thousand subscribers; but it denies that the central energy system had been supplied prior to or at the time of the enactment of ordinance No. 110, but, it is averred, an inferior system known as the trunking system was then in general use by the company. It denies that it has charged higher rates for telephone service, such as it is now supplying. It avers that the said rates are reasonable, and that since the time of the enactment of the ordinance referred to, "ordinary" telephone equipment did not include a metallic circuit nor the central energy feature. That at that time there were only five hundred in the city, and the central energy system was unknown, and therefore ¹³⁹ these were not then contemplated, and it was not intended that the appellant should be prohibited from making special contracts at special rates for special or improved equipment. It admits that when it first began operations in Baltimore City it supplied a metallic circuit, not because it was under legal obligation to do so, according to the terms of the ordinance, but "for purely business reasons," made to compete with its powerful rival, the Chesapeake and Potomac Telephone Company. It avers that this was continued long after it was financially profitable to do so. That as the number of telephones in-

creased the cost per telephone also increased, and it finally became impossible to supply the best service at the rates mentioned in the ordinance. That it therefore became and was necessary to adopt a scale of charges, regulated to some extent by the number of calls per day required by the subscriber. That the rates charged are reasonable, the highest being seventy-two dollars per annum and the lowest sixty dollars, etc.

The testimony taken by both parties shows the contracts entered into between the appellant and the appellees, the kind of service rendered by the former, the cost of supplying it per 'phone, the several kinds of equipment needed, and the financial status of the appellant, and the conditions existing at the time of the passage of the ordinance.

The court, in the case reported in 99th Md., overruled the demurrer to the bill filed by the telephone company, and in its opinion decided as follows:

1. That there was nothing in the previous legislation of 1892, chapter 387, or in the act of 1894, chapter 207, to prevent the appellant from making the contract, which the appellant made, to furnish the citizens of Baltimore with telephone service at the rates specified in ordinance No. 110.

2. That the kind and description of equipment and service that was to be supplied must be sought for, not in the law theretofore existing, but in the contracts that were made.

3. That the "most natural and reasonable construction to be given or meaning to be imputed to word 'telephone' as used in the ordinance" is the "telephone with all improvements, ¹⁴⁰ equipments and appliances essential in its operation to make it most effective in use"; and if any other construction is to be applied, it can be only after it is made to appear from all the "circumstances and conditions surrounding the parties to the contract at the time of the making of the contract that such was the intention."

4. That the design of the ordinance was to promote the public welfare, and to that extent was more than "a mere contract." That the ordinance was within the authority and power of the mayor and city council, and that the appellant at the time had the right to refuse to accept its terms, but it cannot now object that the regulation of rates therein contained is not a reasonable one.

5. And finally, that the ordinance imposed upon the appellant "a duty to the general public which the members thereof

have a right to enforce against it in conditions which will show that is violating such duty."

It is contended upon the part of the appellant that the legal effect of the bill is practically to bring about the enforcement of the contract contained in the ordinance, and that therefore the principles regulating the specific enforcement of contracts must govern. The appellees claim to have the right to require the telephone company to furnish telephone service at \$48 per annum, because of its contract with the city, as embodied in the ordinance No. 110. The plain purpose of this bill is to secure the telephone service, at the rates prescribed, and it is sought to reach this end by an injunction, forbidding and restraining the appellant from interfering with the 'phones, and also from charging or exacting more than forty-eight dollars per annum. Should such an injunction issue, it is clear there would be accomplished everything a decree for the specific execution could effect. It would prevent the removal of the 'phones, and require the continuance of the service at a rate not exceeding \$48 per annum, and this being so, the bill must be taken as one for the enforcement of the contract; and therefore all the principles which apply to the case of a bill for specific performance must be applicable here. This court ¹⁴¹ in *Gurley v. Hiteshue*, 5 Gill, 217, said: "All the principles which apply to the case of a bill for specific performance apply with equal force to the case of a bill for perpetual injunction, when that injunction accomplishes all the objects which could be accomplished by a successful prosecution of a formal bill for specific execution." This doctrine so stated has substantial support in many cases in this state as well as elsewhere: *Canton Co. v. Northern C. R. R. Co.*, 21 Md. 383.

In *Strang v. Richmond etc. R. R. Co.*, 101 Fed. 511, 41 C. C. A. 474, where the complainant sought to use the process of the court to compel by indirection the specific performance of a contract to build a railroad, after citing the last-mentioned case, the court said: "We are clearly of the opinion that it [the bill] does not show such a contract as a court of equity can enforce by decree, and failing in that, it follows that an injunction which was intended to aid the general relief sought by the bill was improperly granted." The same general principle was recognized in the case of *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 46 Atl. 340, 50 L. R. A. 501, where this court held that a contract which has

for its main object the placing of a great corporation in the control of the complainant and his undisclosed associates, will not be specifically enforced, as being against public policy. It is settled that the "specific execution of contracts by courts of equity is not a matter of absolute right in the party applying, but of sound discretion in the court, to be exercised upon consideration of all the circumstances of each particular case. The court will be controlled, of course, in the exercise of its discretion by the established doctrines and settled principles upon the subject; but it does not follow, as matter of course, that because the legal obligation under the contract may be perfect, therefore the equitable power of the court will be exercised to compel or affect specific execution": *Semmes v. Worthington*, 38 Md. 298.

So in the case of *Curran v. Holyoke Water Power Co.*, 116 Mass. 90, where the bill was to enforce specific performance of an agreement of purchase of a parcel of land, by a party who had paid the purchase money and entered into ¹⁴² possession, the court held that his right rested in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances; it was noted that the rights of other parties who have in good faith purchased lots, erected buildings, have intervened: "and although these rights are subsequent in point of time, and therefore subordinate to those of the plaintiff, yet they furnish equitable consideration to be regarded in adjudicating the rights between the parties to this suit." There is a broad distinction between the case of a plaintiff seeking a specific performance in equity and the case of a defendant. In *McCutcheon v. Raleigh* (Ky.), 76 S. W. 51, the court said: "If to enforce specifically an agreement would do one party great injury, and the other comparatively little good, so that the result would be more spiteful than just, the chancellor will not require its execution": See, also, *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 67 N. Y. 149, 55 App. Div. 225. The former is not of absolute right in the party, but of sound discretion in the court; and it will not be granted, but the party will be left to his remedy at law, when the performance has become impossible, or the decree would be inequitable under all the circumstances of the case: 2 Story's Equity Jurisprudence, secs. 750, 759; Pomeroy's Equity Jurisprudence, p. 2164, sec. 1405, note 2; Fry on Specific Performance, sec. 251, note a.

The complaint of the appellees is, that the appellant refuses to furnish the appellees with telephone service at the rates mentioned in ordinance No. 110, and now proposes to remove the 'phones from their places of business unless they agree to pay therefor a higher rate. And their contention is, that the appellant has no power under the ordinance to make such higher charges for any kind of service. On the other side, it is insisted that inasmuch as the ordinance does not describe the equipment to be furnished, for which the charge is to be made, and the words used are indefinite, the facts existing at the time of the passage of the ordinance show that the word "telephone" was intended to include only such telephones as were operated upon the grounded circuit service—and not the metallic ¹⁴³ service, and the ordinance should be so construed. But the proof shows much uncertainty upon this point. At the time the ordinance was passed both the metallic and grounded circuits were in general use. The Chesapeake and Potomac Telephone Company, in 1896, was the only company doing business in Baltimore City. It had then about two thousand seven hundred subscribers, of which two thousand were the grounded circuits and seven hundred were metallic. There was some conflict in the testimony as to the efficiency of these respective methods—and there is also testimony tending to show that that company had begun the execution of a purpose of gradually converting its system to the metallic; and also that the grounded system was growing more or less obsolescent, although it was regarded as effective within a limited radius. By letters and advertisements written to individuals and generally distributed, the appellant publicly and widely proclaimed that it was about to enter into competition with the "present local company." It offered greatly reduced rates; and in one of these public notices it stated that the equipment would include "every telephone on copper wire metallic circuit and equipped with a long distance transmitter; business telephone, \$48; residence, \$36." There is no evidence which shows specifically that the "telephone" referred to in the ordinance was to be one based upon any particular system, but the declarations of the appellant and the preamble of the ordinance showed that it had in contemplation a service equal in every respect to that furnished by its rival, the Chesapeake and Potomac Telephone Company. In the view we take of the case it is not necessary to decide the

matter more definitely than this court has already done in the decision in 99 Md., that the telephone mentioned in the ordinance must be understood to mean such as would furnish the most effective service then in use.

Aside from this question, however, there are other considerations which must control this case.

There is proof that the appellant has now between seven and eight thousand subscribers, of whom there are only eighteen parties to this proceeding or who are now seeking relief of any ¹⁴⁴ kind from the appellant. There are about eight hundred who are passive, and the residue have entered into the new contracts at \$72 per annum.

It seems to be conceded that it is a law applicable to the telephone service that the cost per 'phone increases in rapid ratio as the number of telephones increases. The appellant beginning business upon the passage of the ordinance in 1896, with about eleven hundred, finds it impossible to furnish the service at the same cost with seven thousand five hundred subscribers, as it then did. So that while cost per telephone to the appellant in 1901 up to 1902 was \$34 per telephone, in 1902 it was \$39.74, or a loss of \$2 per telephone; and in the next year there was a deficiency of nearly \$9 per telephone. Mr. Webb testifies that during that year under the old rates the deficiency would amount to over \$70,000, "so that at \$48 and \$36 a year under actual operation demonstrated by actual experience, it means \$72,000 a year less than cost." This would mean only one thing, and that is, that the appellant could not find it possible to continue the service, but would speedily pass into the hands of receivers. The counsel for the appellees, while not resisting this conclusion, attempts to meet it by arguing that the service could still be supplied by deducting the alleged deficiency from the interest on the bonds. These consist of a first issue of \$1,000,000, and a second of \$1,155,000, bearing interest at five per cent, issued to provide the means for constructing the plant. All of the proceeds thereof, besides other large sums, were devoted exclusively to that purpose, and the expenditure was rendered necessary to furnish the equipment necessary to meet the demand of the public. The bonds were put on the market and sold to purchasers. It is not contended they were improvidently issued, or that the money derived therefrom was extravagantly or even unwisely expended for any other purposes than to obtain the means of constructing plant and

conducting its business in such a manner as to enable it to compete with the other company doing business in Baltimore City. So that the proposition asked for by the complainant is that the court shall issue its injunction restraining ¹⁴⁵ the appellant from charging more than the rates provided by its contract as expressed in the ordinance, by which great losses will be incurred by many innocent persons, and the public will be deprived of the benefits of competition in the business of furnishing telephone service, for the benefit of and on the application of eighteen persons. By granting this injunction each of the appellees will be nominally benefited in small amounts; but in fact the appellant may be forced into the hands of receivers, so that the service cannot be rendered at all, and the decree would eventually be of no service to them, while disaster would be brought on the corporation, and large and irreparable losses entailed upon the holders of the bonds; and thereby the very purposes for which the ordinance No. 110 was enacted probably entirely defeated. Under these circumstances it is manifestly the duty of the court to deny the injunctions prayed for, and leave the appellees to such remedies as they may have at law.

Decree reversed, with costs to the appellant.

The Granting of an Injunction is not a matter of strict right in the parties, but it is a matter resting in the sound discretion of the court: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135; *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335; *Gray v. Mayor etc.*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642. An injunction will therefore not be granted, as a rule, when it would be productive of great hardship or oppression or great public or private mischief: *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147; *Gray v. Mayor etc.*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810; *Jones v. Concord etc. R. R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

The Awarding of Specific Performance by a court of equity is a matter, not of absolute right, but of sound discretion: *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255. It may be withheld where the results would be inequitable or unjust: *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647; *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438; *Maguire v. Heraty*, 163 Pa. 381, 43 Am. St. Rep. 800.

MILSKE v. STEINER MANTEL COMPANY.

[103 Md. 235, 63 Atl. 471.]

CONTRACTS, Construction of.—In Construing a Contract Courts Should Place Themselves in the Same Situation as the Parties were who made the contract, so as thereby to judge of the meaning of the words and a correct application of the language to the things described. (p. 357.)

CONTRACT for the Construction of a Building, When not to be Construed in Connection with a Bond Given by the Contractor.—If a contract is entered into for the construction of a building within a time and on the conditions therein specified, and the contractor gives a bond with a surety for the performance of the contract, within such time and upon such conditions, the covenants and conditions of the bond are not to be read into the contract, and taken not only as narrowing and limiting the obligations of the person contracting for the erecting of the building, but also as imposing new and additional duties upon him. (pp. 357-359.)

CONTRACT for the Construction of a Building—Bond Declaring that Neither the Principal nor the Surety Therein Shall be Liable for Damages Resulting from the Act of God.—If a building contract provides that the building shall be constructed within a time specified and according to certain plans and specifications, and that the builder will execute a bond for the faithful performance of his duties in erecting the building, and such bond, when executed and accepted, provides that neither the principal nor the surety shall be liable for damages resulting from the act of God, the bond does not vary or alter the meaning of the contract so as to make the owner answerable for the contract price, or for a portion thereof, when the building as partly constructed is destroyed as the result of a storm. (pp. 357-359.)

BUILDING CONTRACT—Right to Recover on Partial Performance.—If a building contract is entered into, but provides for the payment of specified amounts as the work progresses, an action may be brought for the payment of any such installment when it becomes due by the terms of the contract. (p. 359.)

BUILDING CONTRACT.—Notwithstanding the Destruction of a Partially Constructed Building by a Storm, the owner is under obligation to permit the builder to perform his contract by rebuilding the structure. (p. 359.)

PLEADING, Duplicity in.—If one who has contracted to erect a building for another has two causes of action against the latter, one for a definite sum of money due for work done, and the other for preventing the plaintiff from going on and completing his contract, and states both causes in a single count in his declaration, it is bad for duplicity. (p. 361.)

APPEAL AND ERROR—Remanding Cause for Trial on the Merits Though the Judgment Appealed from was not Erroneous.—If a judgment is entered in the trial court for the defendant because of defects in the plaintiff's pleading, where it is infected with duplicity, the appellate court may, in Maryland, in its discretion, remand the cause for trial on the merits. (p. 362.)

William S. Bansemer, Marbury & Gosnell and Charles P. Coady, for the appellant.

William S. Bryan, Jr., and John H. Richardson, for the appellee.

243 BURKE, J. This is an action of covenant based upon a sealed agreement **244** between the parties to the suit dated June 1, 1903. The suit was originally instituted in the circuit court for Baltimore county, but was subsequently removed to the court of common pleas. By leave of the court the plaintiff, on the 19th of June, 1905, filed an amended declaration which contained three counts, each of which purported to assign breaches of the agreement committed by the defendant. The defendant demurred to each count of the declaration. The court sustained the demurrers, with leave to the plaintiff to amend, which he declined to do, and thereupon the court entered judgment on the demurrers in favor of the defendant. From this judgment the plaintiff appealed. The record, therefore, presents this one question: Was the court's ruling upon the demurrers correct?

The circumstances which gave rise to the suit are as follows: The defendant corporation contemplated the erection of a brick factory and storehouse to be located in Baltimore county, and to that end had plans and specifications for the construction of the work prepared. The contract was awarded to the plaintiff on the 1st of June, 1903, and he obligated himself to complete the work in forty-seven working days. During the course of the erection and construction of the building, and when the same had been almost completed, it was blown down on the 12th of July, 1903, by a storm of unusual violence and severity which swept over the section of the county in which the building was located. It was made a condition precedent to the awarding of the contract to the plaintiff that he should enter into a bond to the defendant, in conjunction with a surety company satisfactory to the defendant, as surety, conditioned for the faithful performance of the contract. There was also stipulation in the contract that as the work advanced to certain stages of completion the plaintiff should be paid certain specified sums. When the storm of the 12th of July, 1903, demolished the building, an installment of fifteen hundred dollars due the plaintiff under said provision of the contract was unpaid.

The proposition for which the plaintiff contends is that ²⁴⁵ under the contract between himself and the defendant all losses or damages which resulted to the building from the storm of July 12, 1903, which the narratio describes as an "act of God," must be borne by the defendant, and that he, the plaintiff, has a right under the contract to recover all such losses and damages to said work as he may be able to show he sustained by reason of the storm. The first and third counts are based solely upon this contention. The second count presents a different question, and will be considered later. The first count seeks to recover an unpaid installment of fifteen hundred dollars, and also the value of the materials used in the construction of the building, which it alleges were retained and used by the defendant. The third count alleges that "the defendant was bound to suffer and stand good for the loss from an 'act of God,' and the plaintiff was relieved from any loss so incurred, and that the defendant was under an obligation to bring the building to the stage of completion to which it had progressed at the time it was destroyed." Under this count the plaintiff seeks to recover profits on the contract, the unpaid installment of fifteen hundred dollars, and the value of the materials used in the work.

The theory upon which the plaintiff seeks to maintain these counts is that the bond and building contract are to be taken together as constituting the agreement by which the rights and duties of the respective parties to the suit must be determined, and that inasmuch as by the third condition contained in the bond given by the plaintiff and the American Surety Company it is provided: "That the principal shall not, nor shall the surety be liable for any damage resulting from an act of God," it is argued that thereby the obligations asserted in the first and third counts were imposed upon the defendant, and that upon this conception of the character and meaning of the contract the pleader has introduced verbatim into each count of the narratio the agreement and bond. It, therefore, appears that the question presented involves an inquiry as to what was the contract entered into between the parties and what were the rights and obligations arising thereunder.

²⁴⁶ It is needless to quote authorities to show that in the construction of a contract the intention of the parties as it appears from the whole agreement must be ascertained and

given its full effect. The rule of construction was stated, with great clearness, in *Nash v. Towne*, 5 Wall. 689, 18 L. ed. 527, as follows: "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

When the contract for the construction of the factory and the storehouse is looked at in the light of these principles, the contention of the plaintiff that the covenants and conditions of the bond which the plaintiff was required to give for the faithful performance of his duties are to be read into the contract, and to be taken, not only as narrowing and limiting his obligations under his agreement with the defendant, but as imposing new and additional duties upon the defendant, cannot for a moment be entertained. The plaintiff undertook to do a certain, definite thing, to wit, the erection and completion of a factory and storehouse according to the plans and specifications furnished by the defendant. These plans and specifications constituted a part of the contract. He was to do all the work and furnish all the materials to be used in and about the erection of the building, and was to do the work in a good and thorough workmanlike manner. He further obligated himself to have the building completed and ready for the business for which the same was to be erected in a specified number of days. Upon the performance by the plaintiff of all the covenants on his part to be performed, the defendant agreed to pay to the plaintiff the sum of eight thousand seven hundred and ninety-four dollars and fifty cents in the following installments, viz.: five hundred dollars when the building is completed to the first floor, and the first floor joists are laid; one thousand dollars to ²⁴⁷ be paid when the building is completed to the second floor, and the second floor joists are laid; one thousand dollars to be paid when the building is completed to the third floor and the third floor joists are laid; fifteen hundred dollars to be paid when the building is completed to the roof and the roof is placed upon the same; five hundred dollars to be paid when the flooring on the first floor is laid and trimmed out; five

hundred dollars to be paid when the flooring on the second and third floors each is laid and trimmed out. The balance of three thousand two hundred and ninety-four dollars and fifty cents to be paid when the building is completed in accordance with said plans and specifications, and same delivered to said party of the second part free of all claims by the party of the first part or any party claiming through him. There is also a stipulation that on the signing of the contract the plaintiff should execute a bond in the sum of four thousand dollars with some responsible bonding company satisfactory to the defendant, "conditioned for the faithful performance of his duties in the erection of said building."

These are the main and substantial provisions of the contract. It is an absolute and unconditional contract on the part of the plaintiff. There are no conditions or contingencies incorporated or provided for therein by which he might be excused from performance, or might be relieved from loss or damage, or whereby the loss occasioned by the storm mentioned in the declaration might be imposed upon the defendant. The bond was given, not to vary or change in any particular the obligations of the plaintiff under the contract, but to secure the faithful performance by him of all the duties assumed by him thereunder. Its object was to protect the defendant from loss or damage which might result from nonperformance by the plaintiff, and cannot be construed to add to or change any of the terms of the contract, or to be taken as a part thereof. When the purpose of the contract, its subject matter, and the surrounding circumstances at the time are considered, it would seem to be perfectly clear that the bond is an entirely independent and collateral contract given to protect the defendant against any default or miscarriage of the plaintiff under the contract. The original obligation to construct the building ²⁴⁸ had been undertaken by the plaintiff, and the bond must be treated as a contract of guaranty or suretyship for the faithful discharge of his duties under his agreement with the defendant. That the original and distinct obligation of the plaintiff existed, and that the bond was a mere collateral agreement founded upon it, appears clear from the language employed and from a consideration of the surrounding circumstances. The bond may, therefore, be dismissed from the case, and should not have been introduced into the declaration.

With the bond out of the case, it must be admitted that the plaintiff cannot recover for the loss which the storm occasioned, for by all the authorities, in the absence of special provisions in the contract providing for such a contingency, the loss must fall upon the plaintiff. In both counts the contract is treated as a subsisting, binding obligation. Neither alleges performance by the plaintiff, nor does either disclose any legal excuse for his failure to perform the contract. The theory upon which both counts rest is that the failure of the defendant to pay the losses which the plaintiff sustained by the storm constitutes a breach of the contract from which a right of action accrued to the plaintiff. This contention, as we have said, is based upon a fallacious construction of the contract, and as both counts are framed upon that construction, both are bad.

They are bad for a further reason which will be stated when the second count is considered, which we will now examine. The contract sued on is an entire and not a divisible contract. The thing with which it deals is the building and construction, in a certain specified manner, of a factory and warehouse. But it contains certain stipulations by which the defendant obligated itself to pay to the plaintiff certain specified and definite sums of money at stated periods as the work progressed. When the building had reached the stage of completion designated in the contract, the obligation of the defendant to pay the sums specified therein became fixed and absolute. But it is argued that because the contract is an entire contract, no suit can be brought thereon until the plaintiff has fully performed his agreement. Whatever may be the ²⁴⁹ rule in other jurisdictions, the mere fact that the contract is entire does not preclude the plaintiff from enforcing the payment of the unpaid installments due and payable thereunder. In *Broumel v. Rayner*, 68 Md. 47, 11 Atl. 833, this court said: "In *Taylor v. Laird*, 1 Hurl. & N. 266, Pollock, C. B., determined that when there is a contract for an entire service, but the parties stipulated that payments for such service shall be made periodically in fixed sums, a failure to make any one of these payments may become the foundation for a suit. Thus it is manifest that many suits may grow out of one contract. This principle has been recognized in all of the states."

Notwithstanding the destruction of the building by the storm, the defendant was under an obligation to permit the plaintiff to perform his contract by rebuilding the structure. In *Black v. Woodrow & Richardson*, 39 Md. 194, Judge Alvey said: "It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory on one party only, but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Thus, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied: *Churchward v. The Queen*, 6 Best & S. 807. And among the instances given of such implied obligation is the case where A covenants or contracts with B to buy an estate of the latter, at a given price; there, although the contract may be silent as to any obligation on the part of B to sell, the law implies a corresponding covenant or contract by him to sell and convey the estate: *Pordage v. Cole*, 1 Saund. 319. Indeed, no better instance of the proper application of the principle could be furnished than the present case. The appellees agreed with the appellant to build for the latter a house on ²⁵⁰ his land for a certain price, part to be paid while the house was in course of erection, but the larger part of the price was not to be paid until the house was completed; although the appellant could not be compelled to have the house built against his consent, yet, notwithstanding the contract is silent as to the appellant's promise that he would suffer the house to be built, the agreement with the appellees for the building of the house clearly implies that he would allow that to be done without which it would be impossible for the appellees to do what they had agreed to do. To allow or suffer the house to be built was the corresponding or correlative obligation of the appellant, implied by the law to the obligation of the appellees to build the house, as expressed by the contract; and for any breach of this implied promise or obligation by the appellant, he was equally liable as upon an express promise."

It is, therefore, clear that if, before the building had been destroyed by the storm, a definite sum of money was due to the plaintiff under the stipulation of the contract for work done, and which the defendant refused to pay, and if, after the occurrence of the storm, the plaintiff was ready and willing to rebuild said factory and warehouse according to the terms of the contract, and was prevented by the defendant from so doing, two distinct breaches of the contract were thereby committed by the defendant, for both, either of which a right of action accrued to the plaintiff. For both of said alleged breaches the plaintiff seeks to recover in this suit. But he has combined the two distinct causes of action in one count of his declaration. He seeks to recover for the failure to pay the installments due, and also to recover damages for the refusal of the defendant to permit him to perform the contract. This vice is found in all the counts. The whole declaration is a flagrant example of duplicity in pleading: Chitty on Pleading, 225; 1 Poe on Pleading, secs. 733-737. This defect in pleading may now be taken advantage of by a general demurrer: Stearns v. State, 81 Md. 341, 32 Atl. 282; State v. McNay, 100 Md. 622, 60 Atl. 273.

²⁵¹ We therefore find no error in the action of the court below in sustaining the demurrers to each count of the declaration, and in entering the judgment for the defendant upon the refusal of the plaintiff to amend the declaration. But if the facts set out in the record be true, the plaintiff has substantial grounds of action against the defendant, and it would be a reproach to the administration of justice if he were denied the right to have his case heard upon its merits merely because of errors in the pleading or mistake of judgment in the pleader in not making the proper amendments. In order to avoid such injustice, it is provided by article 5, section 22 of Code of 1904, as follows: "In all cases where judgment shall be reversed or affirmed by the court of appeals, and it shall appear to the court that a new trial ought to be had, such new trial shall be awarded, and a certified copy of the opinion and judgment of the court of appeals shall be transmitted forthwith to the court from which the appeal is taken, to the end that said cause may be again tried as if it had never been tried; and no writ of procedendo, with transcript of record, shall be transmitted, as heretofore practiced."

It was said in *Creager v. Hooper*, 83 Md. 490, 35 Atl. 159, that under the above-quoted section "this court is vested with discretionary power, when in its judgment the ends of justice will be promoted, to remand a case to the lower court for trial upon its merits. This is manifestly a case for the exercise of its discretion. The merits of the controversy have never been passed upon by the court, nor has the case ever been in the condition that they could be passed upon, and not to remand it would be neither more nor less than a denial of justice." The case of *State v. Baltimore etc. R. R. Co.*, 77 Md. 489, 26 Atl. 865, presented a situation very similar to the one under consideration. In that case the plaintiff had filed an amended declaration to which the defendant demurred. The court sustained the demurrer and entered judgment for the defendant. The plaintiff appealed. This court held the pleading insufficient, and affirmed the judgment, but remanded the case for trial upon its merits. Judge Bryan, who delivered ²⁵² the opinion of the court, said: "We think it just, under the circumstances, to remand the case, in order that the declaration may be amended and the case be brought to trial on its merits, although we shall affirm the judgment." The circumstances of this case, in our opinion, warrant the exercise of the discretionary power vested in this court under the act.

Judgment affirmed and cause remanded for a new trial, the appellant to pay the costs.

The Effect of the Destruction of a Building in course of construction before its completion on the rights and liabilities of the contractor and the owner is considered in the note to *Huyett & Smith Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 285. A contractor is released from his undertaking to repair an old building and construct an annex thereto, where, after the work is practically finished and eighty per cent of the contract price received, the structure is so damaged by fire from lightning that completion is impossible without first restoring the old building; and this, although the contractor should have completed his contract before the fire, and although the contractee offers to restore the old building: *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203. See, in this connection, *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654.

BALTIMORE, CHESAPEAKE AND ATLANTIC RAIL-
WAY COMPANY v. KLAFF & CO.

[103 Md. 357, 63 Atl. 360.]

REPLEVIN for Property in Custody of the Law.—Replevin can be sustained for property under levy under attachment, though the writ issue in an action against a person other than the owner of such property. (pp. 366, 367.)

Ralph Robinson and Bond & Duffy, for the appellant.

Myer Rosenbush, for the appellee.

357 SCHMUCKER, J. This appeal presents the single question whether the owner of personal property can maintain a replevin for it after it has been levied on by the sheriff under an attachment, against a third person, which is still pending. The question arises under the following circumstances:

The appellee, as plaintiff below, instituted the present replevin suit in the Baltimore City court to recover possession of certain chattels which were on board the appellant's steamer, "Pocomoke," at her wharf in Baltimore City. The chattels were taken from the boat by the sheriff under the replevin and delivered to the plaintiff. The appellant appeared to the action and pleaded non cepit, property in a third person, and that the goods when replevied were in possession of the sheriff of Dorchester county, who had seized them under a pending attachment.

358 The case was tried before the court without a jury. There was evidence at the trial tending to show the following facts: The goods in controversy were shipped on March 17, 1905, per the steamer "Pocomoke" by one Orinoff from Cambridge to Baltimore, consigned to the appellee. As the boat was leaving her wharf at Cambridge the sheriff of Dorchester county came on board and levied on the goods under an attachment by way of execution on a judgment rendered by a justice of the peace of that county against Orinoff. The goods were attached as per schedule and the writ was also laid in the hands of the captain of the boat as garnishee. The sheriff allowed the goods to remain on board the boat and went along with them to Baltimore City. On the arrival of the boat at Baltimore the goods were taken by the sheriff

of that city under the writ of replevin in the present case. There was also evidence tending to prove the value of the goods and that they had never been the property of Orinoff but were owned by the appellee.

At the close of the evidence the appellee, as plaintiff, and the appellant, as defendant, each offered one prayer. The plaintiff's prayer asked the court to declare, as matter of law, that if it found from the evidence that, at the time of the issuing of the writ of replevin in this case, the plaintiff was entitled to the possession and the right of possession of the goods seized under the writ, he was entitled to a verdict for the goods replevied, together with such damages as the court should find that he had sustained by reason of their detention. The court granted that prayer.

The defendant's prayer, which was rejected, asserted the proposition that as the evidence showed that the goods replevied had prior to the replevy been attached and scheduled by the sheriff of Dorchester county while the defendant's boat was lying at Cambridge and the attachment had been laid in the hands of the captain of the boat and he had been returned as garnishee and the schedule of the goods had been returned in the case in which the attachment had been issued, the verdict must be for the defendant.

359 The ruling of the court on these two prayers presents the question whether the goods in question, being in custodia legis by virtue of their attachment, were liable to be replevied under the writ issued in this case.

The appellee does not deny the accuracy of the general proposition of law that property in custodia legis cannot be replevied, but he contends that cases like the present, where the property of the plaintiff has been attached under a writ running against a third party, constitute a recognized exception to the proposition. In support of his contention he relies upon *Clark v. Skinner*, 20 Johns. (N. Y.) 465, and a number of more recent cases in the courts of last resort of many states, and also upon the statement made on page 500 of volume 24 of *American and English Encyclopedia of Law*, second edition, that "by the great weight of authority, however, which in some jurisdictions is recognized by statute, it is held that where in process running against the property of one person the property of another is taken, the latter may maintain replevin therefor, even though the property was in

possession of the attachment or execution debtor or a third person at the time of its seizure."

We have examined many of the cases appearing on the appellee's brief and of those cited in the Encyclopedia in support of the statement there made. Those cases undoubtedly show that in many, if not the majority, of the American states the exception contended for by the appellee is now recognized and upheld, but our predecessors in this court have been clear and emphatic in maintaining the opposite view.

In *Cromwell v. Owings*, 7 Har. & J. 55, this court, although recognizing the fact that in this state the action of replevin has nearly taken the place of trespass and trover, and is the usual and almost universal remedy resorted to for the recovery of goods in the possession of another, whether tortiously taken or not, held that it will not lie for goods which are in custodia legis by reason of having been taken in execution under legal process, even though that process was against a stranger who was not the owner of the goods. The court in their opinion ³⁶⁰ admit that "the application of the rule 'that goods taken in execution cannot be replevied' to the case of a stranger whose property has been taken on an execution against another person may sometimes be attended with individual inconvenience," but they insist upon its application, saying that "it is not the officer that the law protects in doing wrong, but the possession only of the chattels in order to effect its own ends, the purpose for which the execution issued," and to prevent a contempt of the jurisdiction of the court issuing the execution.

This court in the opinion in that case refer to the cases of *Thompson v. Button*, 14 Johns. 84, and *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302, but decline to follow their reasoning or adopt their conclusions. The court then say in concluding their opinion: "But the question whether the goods of a stranger taken out of his possession on an execution against another person can be replevied out of the hands of the officer, having also been discussed, and being a question in which the public is materially concerned, and therefore proper to be settled, we avail ourselves of this occasion to express our opinion upon the subject. In *Thompson v. Button* and *Clark v. Skinner* it is held that in such case a replevin will lie.

“But we cannot perceive any sufficient ground for the distinction. In either case the taking of the property of a stranger is wrongful as to him, and as much so in one case as in the other, and if replevin will lie by a stranger whose property is taken in execution out of his possession, on the principle that it is wrongfully taken, it would seem to follow that the same writ will equally lie for an equally wrongful taking of the property of a stranger out of the possession of a defendant. But it does not depend upon the question whether the property was wrongfully taken or not, which can only be determined at the trial, but whether it was in the custody of the law or not, and that once established, the possession cannot be disturbed, but the party injured is left to seek his remedy by an action of trespass or trover, or to wait until the goods are sold and then regain his possession by a writ of replevin against the purchaser in whose hands they cease to be ³⁶¹ in the custody of the law. Upon that principle we think that in no case whatsoever will replevin lie against an officer for goods taken in execution under lawful process; and so is the case of *Ilsley v. Stubbs*, 5 Mass. 280. If it were otherwise, it would always be in the power of a defendant to evade the law and defeat the ends of justice, by placing his property in the hands of a friend and causing it, when taken in execution, to be replevied from the hands of the officer by such friend; and thus the mischief would be just as great as to permit a defendant to replevy property taken in execution out of his own possession.”

In *Ginsberg v. Pohl*, 35 Md. 505, a case in which the goods had been seized under an attachment which was still pending, the opinion in *Cromwell v. Owings* was referred to with approval and its conclusions adopted and relied on, and the cases of *Thompson v. Button*, 14 Johns. 84, and *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302, were referred to as having been disapproved of by this court. *Cromwell v. Owings*, 7 Har. & J. 55, has been cited with approval in more recent cases, the last being *Fidelity & Deposit Co. v. Singer*, 94 Md. 124, 50 Atl. 518, upon other aspects of the action of replevin, but none of the conclusions to which we have referred have been doubted or called in question.

Mr. Poe, in the admirable discussion of the question when replevin will and when it will not lie appearing in section 252 in his work on Pleading, also holds it to be the well-established

doctrine in this state that the action will not lie for goods in the custody of the law, even though they may have been taken on an execution against a stranger.

The judgment appealed from must be reversed and the cause remanded.

Judgment reversed with costs and case remanded for new trial.

Replevin Against Officers is considered in the note to *Carpenter v. Innes*, 25 Am. St. Rep. 256. The general question of when replevin is maintainable is the subject of a note to *Sinnott v. Feiock*, 80 Am. St. Rep. 741.

MORGART v. SMOUSE.

[103 Md. 463, 63 Atl. 1070.]

STATUTE OF FRAUDS.—The Transfer of an Equitable Interest in Land is as much within the statute of frauds as the transfer of the legal interest. (p. 370.)

STATUTE OF FRAUDS—Pleading.—One who has filed a general issue plea and thus denied the existence of a contract sued upon is entitled to rely on the statute of frauds. (p. 370.)

STATUTE OF FRAUDS—Agreement to Purchase Lands as Partners or on Joint Account.—An agreement between two persons that they will purchase lands and develop and sell them on joint account, and share equally in the profits and losses of the venture, is not within the statute of frauds, but constitutes them partners to the extent of the undertaking governed by it. (p. 370.)

PARTNERSHIP, Essentials of.—The essentials requisite to constitute the relation of partners are a community of interest between the parties for the purpose of profit. (p. 371.)

PARTNERSHIP Between the Parties is a Matter of Intention to be proved by their express agreement or inferred from their acts. (p. 371.)

PARTNERSHIP in Lands, When Exists.—An agreement by two or more persons to buy land and sell it and share the profits or profits and losses constitutes them partners for that venture, and entitles either of them to an accounting in equity for his share of the joint transaction. (p. 371.)

STATUTE OF FRAUDS—Partnership in Lands.—An Oral Agreement is Sufficient to constitute a partnership to deal in lands. (p. 372.)

PARTNERSHIP in Lands, Action at Law for a Share of the Profits of.—If two persons have entered into a partnership to buy and sell land, an action at law cannot be maintained by one of them against the other for a share of the profits of the venture, there not appearing to have been any settlement of accounts between them. (p. 372.)

Ferdinand Williams and De Warren H. Reynolds, for the appellant.

Thomas J. Peddicord and D. James Blackiston, for the appellee.

464 SCHMUCKER, J. The appellee sued the appellant in the circuit court for Allegany county to recover what he claimed to be his share of the profits realized from the purchase and sale of certain real estate. The declaration contained only the common counts in assumpsit, but it was accompanied by a bill of particulars in the form of an account charging the defendant with one-half of specified profits alleged to have been received by him on three several transactions. The count relied on in argument by the plaintiff was the one for money had and received for his use.

The appellant, as defendant, pleaded two general issue pleas, and also payment and limitations, whereupon the plaintiff joined issue on all of the pleas except that of limitations, to which he replied a new promise. To that replication the plaintiff rejoined that he had been kept in ignorance of his cause of action by the defendant's fraud until within less than three years before the bringing of the suit.

The case was tried before the court without a jury and the verdict and judgment were against the defendant, who took this appeal. There is but one bill of exceptions in the record and that is to the court's ruling on the prayers.

The plaintiff, to support his case, offered evidence tending to prove the making of a verbal contract between him and the defendant for the purchase, development and sale for their joint account of two parcels of land, the one containing five thousand **465** acres, known as the Cunningham tract and the other, containing thirteen hundred acres, known as the Maynadier tract.

To establish the contract in reference to the Cunningham tract the plaintiff himself went upon the stand as a witness, and after saying that he had frequent interviews with Mr. Hamill, the owner of the lands, beginning in 1896, he testified as follows: "I met Mr. Hamill a number of times afterward, and in conversations about this land I finally got a price for him on the land, as he represented three-fourths owners of the property at the time, and he told me he would sell me the land on time payments at five dollars per acre." Then, after saying that he had made arrangements to borrow the

money to buy the land when Morgart, the defendant, came frequently to see him in June or July, 1898, and offered to go into the deal with him, he described the making of the contract with Morgart as follows: "We were talking over this property and I told him about having arranged for the money to buy the one tract; he said to me that it would be foolish to go into a deal of that kind, and if I would allow him to go in this deal he would furnish whatever money it took and that he would take one-half of the profits whatever we made out of it, and it would relieve me of borrowing this money, and I arranged not to take this money." In reply to the question, "Just state what Mr. Morgart offered to do," the plaintiff testified, "Mr. Morgart's offer was that he would furnish all the money required to run this deal to a finish, and do all the work connected with it, and would do that in consideration of half the profits to be made out of it, and, on the other hand, if we lost in it I was to put up my half of what was lost"; and further testified that he accepted Morgart's proposition.

The plaintiff and Morgart, a short time thereafter, went together to see Mr. Hamill, who declined to give them at that time a written option on the land, as he had given the refusal of it to other parties for thirty days. After the expiration of the thirty days Morgart went again to see Mr. Hamill, and when he returned he told the plaintiff that Hamill had given him a written option for the land, and had charged him a hundred ⁴⁰⁰ dollars for it, but the plaintiff never saw this alleged written option, nor, if it existed, was it put in evidence in the case.

In reference to the Maynadier tract, the plaintiff testified, fixing the date as sometime in November, 1898: "Mr. Morgart acted on my instructions to him for to buy the Maynadier land; it was understood it was to go in the same deal. I explained to him it was the natural outlet to get the timber away from the Cunningham lands, and, after going on the Cunningham land, he saw that himself. . . . My arrangement [with Morgart] was that I was to share in the whole deal, and that it was to apply to the Maynadier as well as the Cunningham."

The defendant Morgart stoutly denied the truth of this testimony of the plaintiff, but there is other evidence in the record tending to corroborate it, from which the court might have found it to be true. We will, for the purposes of this opinion,

give the plaintiff the benefit of his own version of the contract on which he bases his right to recover.

Neither the Cunningham nor the Maynadier tract of land was conveyed by its owners to either of the parties to this suit, but there is evidence in the record tending to show that both tracts were conveyed in 1899 to purchasers procured by Morgart, and were afterward sold at an advance by those purchasers, and that Morgart received a portion of the profits thus realized, and refused to divide the amount so received by him with the plaintiff.

The plaintiff's alleged contract with Morgart must be regarded as having been intended to be either a verbal assignment by the former to the latter of a one-half interest in an equitable estate in the lands mentioned in the evidence, or an agreement between the two parties for the future purchase, development and sale of those lands, and an equal division of the profits or losses to result from the venture. Treated as an assignment of an equitable interest in the lands, it was void under the fourth section of the statute of frauds, for it is well settled that a transfer of an equitable interest in lands is as much within the operation of the statute as a transfer of a ⁴⁶⁷ legal interest: *Polk v. Reynolds*, 31 Md. 106; 29 Am. & Eng. Ency. of Law, 2d ed., 888, and cases there cited.

The defendant, having filed the general issue pleas, and thus denied the existence of the contract sued on, was entitled to invoke and rely upon the statute of frauds, as he did on his brief and in argument, without having set it up by plea: *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709; *Semmes v. Worthington*, 38 Md. 298.

Furthermore, the plaintiff, when he made the contract with Morgart, possessed, so far as the evidence in the record goes, no valid title either legal or equitable to the lands, as he had nothing more than a verbal promise from their owner to sell them to him at a certain price: *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14. Nor can the plaintiff escape from the toils of the statute upon the ground contended for by him, that the contract had been fully executed when he brought his suit, because, whatever may be said of the effect of the conveyances appearing in the record from the owners of the lands to various purchasers and from the latter to their vendees, such conveyances were not an execution of the verbal contract of Hamill to sell the lands to the plaintiff nor of the latter's verbal contract to transfer a half interest in them to Morgart.

If, on the other hand, we treat the contract between the plaintiff and Morgart as an agreement made by them to purchase, develop and sell the lands for their joint account, and share equally the profits and losses of the venture, the statute of frauds was not applicable to it, but it constituted them copartners quoad the undertaking covered by it. The requisites of a copartnership have been stated by the text-books and cases in various forms of expression, which substantially agree that the essential requisite to constitute the relation is a community of interest between the parties for the purpose of profit. Ordinarily, the profits are expected to arise from the purchase and sale of some form of property, but they may be produced by the skill and industry of the partners, as in the case of professional firms or those for the organization or promotion of various enterprises: Parsons on Partnership, secs. 468 58-61; Lindley on Partnership, 10-13; Rowland v. Long, 45 Md. 439; Heise v. Barth, 40 Md. 259; 22 Am. & Eng. Ency. of Law, 2d ed., p. 27.

As between parties, partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct. If they intend to and do enter into such a contract as in the eye of the law constitutes a partnership, they thereby become partners, whether they are designated as such or not in the contract. The late Judge Robinson, in speaking for this court in Thillman v. Benton, 82 Md. 64, 33 Atl. 485, after reviewing the authorities bearing upon this subject and commenting upon the earlier decisions of this court in Rowland v. Long, 45 Md. 439, arrived at the following conclusion as to the present state of the law: "We take it then to be well settled that a partnership is a contract of some kind involving mutual consent of the parties, and when such a contract is entered into between two or more persons for the purpose of carrying on a trade or business with the right to participate in the profits of such trade or business, then such a contract constitutes a partnership, unless there be other facts and circumstances which show that some other relation existed."

It has been repeatedly held in other jurisdictions that an agreement by two or more persons to buy land and sell it, and share either the profits or the profits and the losses, constitutes them partners for that venture, and entitles either of them to an accounting in equity from the others of the joint transaction: Van Houton v. Copeland, 180 Ill. 74, 54 N. E. 169;

Speyer v. Desjardins, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; Hill v. Sheibley, 68 Ga. 556; Parsons on Contracts, 4th ed., sec. 67. A verbal agreement is sufficient to constitute a partnership to deal in lands, the statute of frauds not being applicable to such contract: Parsons on Partnership, 4th ed., sec. 6; Lindley on Partnership, 88, 89; Van Houten v. Copeland, 180 Ill. 74, 54 N. E. 169; Speyer v. Desjardins, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; Bruns v. Spalding, 90 Md. 349, 45 Atl. 194; 29 Am. & Eng. Ency. of Law, 2d ed., 897.

Such being the law controlling the relations of the parties ⁴⁶⁹ to this appeal in respect to the subject matter of the present suit, the appellee was not entitled to recover in an action at law against the appellant for a share of profits of their joint venture in the Cunningham and Maynadier tracts of land, there not appearing to have been any settlement or account stated between them.

Under these circumstances the learned judge below should not have granted the plaintiffs' third prayer, which declared, as matter of law, that if the court, sitting as a jury, found the facts therein stated, the plaintiff was entitled to a verdict in his favor. On the contrary, he should have granted the defendant's first prayer, which asked him to declare, as matter of law, that under the pleadings in the case there was no evidence legally sufficient to entitle the plaintiff to recover, and the verdict must be for the defendant. In the view which we have taken of the case, we deem it unnecessary to notice in detail the other prayers which asked for rulings upon segregated portions of the facts of the case.

For the error of the court below in granting the plaintiff's third prayer and rejecting the defendant's first prayer, the judgment appealed from must be reversed, without a new trial.

Judgment reversed, with costs, without a new trial.

While a Contract by Two Persons to Purchase real estate for their joint benefit is within the statute of frauds, it seems that an agreement to create a partnership for the purpose of buying and selling lands for profit is not an agreement for the sale of lands, and is not within the statute. See the note to McCoy v. McCoy, 102 Am. St. Rep. 239.

SCHIRM v. WIEMAN.

[103 Md. 541, 63 Atl. 1056.]

CONTRACT—Agreement to Pay for the Return of Stolen Property.—An agreement to pay for the return of stolen property, or a check given to procure such return, is neither illegal, immoral nor against public policy, and may be enforced where it does not interfere with the public interest and duty, respecting the apprehension and conviction of the criminal. (p. 378.)

J. Cookman Boyd, for the appellant.

Alonzo L. Miles, German H. H. Emory and John T. Morris, for the appellee.

⁵⁴¹ PAGE, J. This suit was instituted to recover upon a check given to the appellant by the appellee, under the circumstances which ⁵⁴² will afterward be stated. The case was tried without the intervention of a jury, and but one exception was taken, and that was to the action of the court upon the prayers asked for by the respective parties. The court, by its granted instruction, decided there was no sufficient evidence to entitle the appellant to recover. The judgment being against him, the appellant has appealed.

The following facts appear from the record: In July, 1904, the appellant and the appellee, together with two other persons, all members of the Order of Elks, occupied the same room in a hotel in the city of Cincinnati, on the occasion of a convention of the members of that order. During the night the watch of the appellee was lost, under circumstances which led to the belief that it had been stolen. Notice was given by the appellee of his loss, and extensive searches therefor were instituted by officers and detectives throughout the hotel and elsewhere, without, however, obtaining any clue as to the manner of its mysterious disappearance. The appellee obtained no information about his watch until the 7th of December, 1904. About that time the appellant had an interview with a Mr. Lyons, since deceased, a detective in the city of Baltimore. After pledging him not to reveal what he was about to tell him, Lyons told the appellant that the appellee could recover his watch, "but would have to pay for it"; that "parties outside the state had communicated with him, and told him they would accept three hundred and fifty dollars for it." Neither at that time nor subsequently was the appellant in-

formed who these persons were, and he never knew more of the matter that was communicated to him by the detective Lyons. It was shown that on that occasion Lyons employed the appellant "to communicate this information to Mr. Wieman, and if Mr. Wieman was satisfied to accept the proposition, to turn over the money to Lyons and get the watch and return it to Wieman." The appellant also stated in evidence and there is nothing to contradict or in any respect impeach it, that he knew of the loss of the watch and believed it had been stolen; but he had no knowledge as to that fact or the manner of its loss, other than ⁵⁴³ that which Wieman himself communicated to him. The appellant communicated this conversation to the appellee. At first the latter refused to pay anything; but, after several weeks, he agreed to give three hundred dollars if the watch could be returned to him in good condition. The appellant so informed Lyons, and the sum was then agreed to. The appellant testifies, without being contradicted, that the state of his knowledge at that time was that "Mr. Wieman agreed to pay the money; that the watch was at that time outside the state, and that it was sent for at his [Wieman's] request, through him, and that Lyons would not have sent to New York for the watch except Mr. Wieman had authorized me to tell him to have it sent for, and that he [Wieman] would pay the three hundred dollars for it."

It was under these circumstances that the appellee and appellant met on the 4th of April to carry out the understanding between them as to the return of the watch. Wieman's account of the conversation is substantially as follows: Schirm asked Wieman, "Have you got the money?" "Wieman replied he had a check"; that he paid everything by check, and besides, he said, "Suppose he gave a check and that fellow should pocket the money, and keep the watch too, he would have no redress," and "How do I know the watch is not all battered up?" He, Wieman, then suggested to call in Hengen & Bates, and let them examine the watch. Schirm objected to this. Wieman then proceeds: "There is no shenanigan about this. I was to say this and when I did make that remark I felt a little guilty, because there was some scheme arranged beforehand to have a deputy sheriff there, and to seize it, 'but I told him there was no shenanigan about it.' I wanted the watch at any price." He, Schirm, said, "Well,

I will tell you what I will do, I will go to your bank and cash that check. I will first go to the other party and show them I have got the check." In reference to the last statement, the testimony of the appellant is, that he (Schirm) said, "I will go over to the Fidelity and Deposit Company and get it cashed, because I will have to deliver the cash for it." Upon this conversation the appellee delivered the check on the Drovers' and Mechanics' ⁵⁴⁴ National Bank to the appellant, who indorsed it and had it cashed at the Fidelity and Deposit Company after it was indorsed by Schirm. With the proceeds Schirm obtained the watch and delivered it to the appellee. The payment of it was the same day stopped by Wieman, and the appellant afterward was compelled to make it good, and has not since been reimbursed.

It is contended that under these circumstances there can be no recovery, because the consideration of the check was the advancement of money to be used for an illegal purpose—that is, for securing the return by a thief of property alleged to have been stolen. It undoubtedly is a correct principle that one who furnishes funds to another whom he knows, or has every reason to believe, intends to devote them to the perpetration of crime, and that they were procured for that purpose, will not be allowed to maintain an action on his contract. He cannot do so, for the reason that, as was said by Judge Story in his Conflict of Laws, section 253, "no one can hesitate to say that such a man voluntarily aids in the perpetration of the fraud, and, morally speaking, is almost, if not quite, as guilty as the principal offender": *Hanauer v. Doane*, 79 U. S. 342, 20 L. ed. 439. But is that the case with which we are now dealing? Was it intended by any of the parties to perpetrate a crime with the proceeds of a check? The purpose, as shown, was to employ it in an arrangement having for its object the return of the watch, by the supposed thief, to its real owner. Unless this object was for some sufficient reason fraudulent, or legally wrong, or contrary to public policy, the act of the appellant in advancing or otherwise procuring the money on the appellee's check cannot be so tainted as to preclude the recovery by the appellant of the amount paid him on that account. And this legal conclusion would be equally sound, even though in the transaction in which he advanced his own money or credit for the use of the appellee, the appellant was acting as the

agent of the detective, or even of the thief, inasmuch as it was on the credit of the appellee that he acted, unless by so doing he participated in some wrong act.

⁵⁴⁵ It seems to be clear that unless it can be maintained that it was illegal or morally wrong, or contrary to public policy, for the appellee to pay money to the detective or to anyone else, for the purpose of recovering his own property, the legal right of the appellant to recover from Wieman in this case cannot be questioned. Now, was it illegal or morally wrong, or contrary to public policy, for Wieman to pay more money to secure the recovery of his own property which presumably had been stolen? The solution of this question depends upon the nature of the act and its effect upon the public interest. Every case of larceny may be considered from two points of view: first, with respect to the interest of the general public in the matter, and then as to the interests of the real owner of the lost property. As to the first, it seems to be clear that the public has no property interest, and indeed no other interest, except such as grows out of its duty to protect property and enforce its laws in the interest of the public. For these reasons, it is of public interest and in accordance with public policy that the laws for the protection of property shall be effective, in order that the offenders may be promptly apprehended and convicted. Therefore, all proposed agreements made with the thief or with anyone, by which the apprehension of the criminal, his trial or conviction may be prevented or obstructed, are contrary to public policy, and absolutely void. With respect to the personal property interests of the real owner, the public has no particular concern. There can be no reason assigned why the owner of stolen property cannot pursue his own interest as he deems proper, so long as there is no interference with the proper enforcement of the laws in the pursuit, apprehension and conviction of the criminal. The owner may properly take no step nor make contracts or arrangements that in any respect will interfere with the performance of these things. He may sue the thief or others in the possession of the stolen property in replevin or by any other appropriate proceeding, and it seems to be without reason to deny him the right to negotiate for the return of any of the property he could sue for, provided he agrees to nothing that ⁵⁴⁶ has the object or effect of obstructing, impeding or preventing the apprehension or conviction of the criminal. Upon a contract containing such

features, having such a purpose or effect, there can be no recovery; it is contrary to public policy and void; and, it may be added, that if anyone advances money for such a purpose, participates in the illegal purpose, and his contract for that purpose is tainted, contrary to the public interest and is void.

There seems to be a wide concurrence in the general principle that a contract for the return of stolen property to the true owner is not void, as being contrary to public policy, so long as it does not interfere, or tend to interfere, with the public interest and duty respecting the apprehension or conviction of the criminal. It was stated by the supreme court of the United States in *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 12 Sup. Ct. Rep. 632, 36 L. ed. 414, that "ordinarily the law leaves to parties the right to make such contracts as they please, demanding, however, that they shall not require either party to do an illegal thing, and that they shall not be against public policy or in restraint of trade."

In *Burnett v. Weber*, 125 N. Y. 22, a suit to foreclose a mortgage, given to secure to the plaintiff payment for goods stolen, the defense set up was that it was given to compound a felony; the court held that it was necessary "to show that there was some agreement or promise on the part of the mortgagee to forbear prosecution for the crime, or to suppress evidence that would tend to prove it." So in *Ford v. Cratty*, 52 Ill. 313, an attorney who retained and refused to pay over money of his client, was shown a warrant for embezzlement, and told that unless he paid or secured the claim the prosecution would be pushed to a conclusion. It was held not to be regarded as having been given to compound a felony. The same view is maintained in *Brittin v. Chegary*, 20 N. J. L. 625; *Deere v. Wolff*, 65 Iowa, 32, 21 N. W. 168.

In *Ward v. Lloyd*, 7 Scott (N. R.), 499, 46 Eng. Com. L. 785, it was moved to set aside a warrant on the ground that it was founded upon an illegal consideration, namely, an agreement to abstain from prosecuting the defendant for embezzlement. The court held, ⁵⁴⁷ per Tindal, C. J., that "this is not a case of security given to induce an uninterested party to withhold a charge of a criminal nature; there is a just debt due from the defendant to the plaintiff"; and Maule, J., said: "The plaintiff demanded what he had a perfect right to demand, viz., the money due him; and the defendant did what he was bound to do, namely, give a security for money he was bound to pay": *Portner v. Kirschner*, 169 Pa. 472, 47 Am. St.

Rep. 925, 32 Atl. 442; Cass County Bank v. Bricker, 34 Neb. 516, 33 Am. St. Rep. 649, 52 N. W. 575. Many other cases of similar import could be cited. A large number of these will be found referred to in the sixth volume of American and English Encyclopedia of Law, page 410, and note 6, to the effect that it is perfectly lawful for the parties to compromise the civil liability arising from the commission of an offense, and if this be the sole purpose, it is valid.

In this case there is no evidence that the appellee agreed to compound the felony or intended to do so. In fact the proof is not clear that it was the thief who had the possession of the watch. Many circumstances might have then existed which would show that the person for whom the detective was acting came into its possession without having been guilty of a crime. But without laying much stress upon this, the evidence makes it clear that the purpose of the appellee was solely to regain his property, and in his efforts to do so carefully refrained from making any terms other than upon the payment of the money he was to receive his property. In Brittin v. Chergary, 20 N. J. L. 625, the court said of a transaction similar in some respects to this, that it was "merely getting his own money."

We hold that Wieman, in paying the money and receiving the property, did not violate any rule of law, and therefore the act of Schirm in having the check cashed upon his indorsement, does not now preclude him from recovering from Wieman the amount which in consequence thereof he has had to pay.

It follows that the plaintiff's first prayer should have been granted and the first of the defendant rejected. The other prayers were properly refused.

Judgment reversed, with costs to the appellant, and new trial awarded.

It is Neither Unlawful nor Against Public Policy for an embezzler to voluntarily give a bond with sureties for the return of the money which he has wrongfully taken: Portner v. Kirschner, 169 Pa. 472, 47 Am. St. Rep. 925; Miller v. Minor Lumber Co., 98 Mich. 163, 39 Am. St. Rep. 524. And the owner of goods stolen or wrongfully taken has a right to receive compensation for the injury sustained, and may take a note signed with sureties therefor. In such a case, unless there is an agreement not to prosecute or to suppress evidence of the crime, the defense of compounding a felony is not available against the note: Cass County Bank v. Bricker, 34 Neb. 516, 33 Am. St. Rep. 649.

DOAN v. ASCENSION PARISH.

[103 Md. 662, 64 Atl. 314.]

CORPORATIONS, Devises to.—The Misnomer of a Corporation will not defeat a devise or bequest to it if its identity is otherwise sufficiently established. (p. 381.)

TRUST, When not Created.—The legal owner of property is prima facie entitled to its beneficial enjoyment, and to convert him into a trustee, there must be a sufficient indication of the intention of the parties that he is to hold for the benefit of others. (p. 382.)

A TRUST cannot Exist when the same person possesses both the legal title and the right to the beneficial enjoyment. (p. 382.)

TRUST, When not Created by Devise to the Vestry of a Church. A Devise to the vestry of Ascension Church to be used for such church purposes as the rector of the church may direct, accompanied by a statement that it is the purpose and desire of the testator that the property shall be under the control of the rector of the church and be used for such work as he may deem best for the interest of the church, does not create a trust, for the reason that the devise gives both the legal title and the beneficial interest in the property to the vestry of the church, to be used for its corporate purposes. The power given to the rector is a naked collateral power, repugnant to the fee devised to the vestry, and therefore void. (p. 386.)

James A. C. Bond, Stevenson A. Williams and F. Neal Parke, for the appellant.

John Milton Reifsnider and Guy W. Steele, for the appellee.

⁶⁶² PEARCE, J. This is an appeal from a judgment of the circuit court for Carroll county in an action of ejectment brought by Lucretia E. Doan, George L. Van Bibber and others, against “The ⁶⁶³ Vestry of the Parish of the Ascension of Carroll County,” a body corporate of the state of Maryland, and “The Order of the Holy Cross of Westminster. Maryland,” also a body corporate of the state of Maryland, to recover thirteen undivided eighteenthths of a parcel of land lying in Westminster, in Carroll county, Maryland, and fully described in the declaration. The case was tried below without a jury on an agreed statement of facts, providing that if the court should be of opinion that the plaintiffs were entitled to recover, then the court should enter judgment accordingly with one cent damages and costs; but if the court should be of opinion that the plaintiffs were not entitled to recover,

then judgment should be entered for the defendants, with costs, reserving the right of appeal to either party.

It appears from the statement of facts: 1. That Lucretia E. Van Bibber, being seised in fee of the parcel of land described in the declaration under a valid conveyance thereof, erected certain buildings thereon, and on September 25, 1892, conveyed said land and buildings to the defendant, "The Order of the Holy Cross of Westminster, Maryland," so long as it should use said land and buildings for the corporate purposes mentioned in its certificate of incorporation, with a proviso that if it should cease to use the same for such corporate purposes, then the title thereto should revert to, and vest in, the said Lucretia E. Van Bibber, her heirs and assigns. 2. That the said "The Order of the Holy Cross of Westminster, Maryland," without ever obtaining the sanction of the legislature of Maryland to said conveyance, entered into possession of said land and buildings upon the execution and delivery of said conveyance, and continued to use the same for its corporate purposes until April 24, 1905, when it finally abandoned the user thereof for its corporate purposes. 3. That the said Lucretia E. Van Bibber died February 8, 1896, leaving a last will and testament duly executed and admitted to probate by the orphans' court of Carroll county, whereby, amongst other things, she devised as follows: "Whereas, I have heretofore, by deed dated September 25, 1892, granted ^{and} conveyed a parcel of land containing one acre, one rood and four perches of land more or less to 'The Order of the Holy Cross of Westminster, Maryland' (a body corporate of the state of Maryland), subject to the following condition: 'That in the event said Order of the Holy Cross should at any time hereafter abandon said premises for the uses in its certificate of incorporation mentioned, then in that event said land and premises, with the buildings and improvements thereon, shall revert to me, my heirs and assigns,' as appears by said deed—and desiring to provide for the disposal of said property in the event of the abandonment and the reversion of the same, as in said deed set forth, I give and devise said land in said deed described and thereby conveyed, to the Vestry of Ascension Church, Ascension Parish, in Westminster, Carroll county, Maryland, to be used for such church purposes as the rector of said church shall or may direct, it being my purpose and desire that the said land and buildings thereon shall be under the control of the rector of the Ascen-

sion Church, and shall be used for such work as he may deem for the best interest of Ascension Church"; 4. That upon the abandonment of said land and buildings as aforesaid, the said Order of the Holy Cross of Westminster, Maryland, surrendered and delivered the actual possession of said land and buildings to "The Vestry of the Parish of the Ascension of Carroll County," one of the defendants, which accepted said delivery and possession, and entered upon said lands and buildings, and now holds the same, and has ever since rented the same by the direction and with the consent of the rector of said church, the money derived therefrom being used for the purposes of the Ascension Church, it now and always being the only church within the territorial limits of said parish, there being but one Ascension Church, and but one Ascension Parish in Carroll county, embracing the town of Westminster. 5. That since the institution of this suit, at the first session of the legislature after the abandonment of said premises by the said Order of the Holy Cross, the legislature gave its sanction and consent to the devise now in question in the will of said Lucretia E. Van Bibber. And 6. That if said devise is not valid and effective, then the plaintiffs are entitled to thirteen undivided eighteenthths of said land and premises.

It will be seen that the corporate name and title of "The Vestry of the Parish of the Ascension of Carroll County" is not correctly given in Miss Van Bibber's will, it being there called "The Vestry of Ascension Church, Ascension Parish, in Westminster, in Carroll county, Maryland." It is too well settled, however, to admit of question that the misnomer of a corporation will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain. As was said in *Woman's Foreign Miss. Soc. v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711: "When it is clear who was intended to take, the accidental miscalling of the beneficiary's name will not invalidate the gift." And again in *Reilly v. Union Protestant Infirmary*, 87 Md. 668, 40 Atl. 894, it was said: "The name is simply descriptive of the legatee. The name is no more the legatee than is the name of an individual the individual himself." It is too obvious for argument, upon reference to the agreed statement of facts, that the beneficiary was intended to be "The Vestry of the Parish of the Ascension of Carroll County," and we understand that this is practically conceded by the appellant.

Neither is it denied that Miss Van Bibber had the power and right to devise this property, and the sole question presented is, whether under a proper construction of the language, the devise is valid or void.

The plaintiff asserts that this devise creates a trust in its subject matter, and that the trust thus created is void, because its objects are not ascertained, and also because, even if ascertained, it is a perpetuity; while the defendants contend that the devise is of a fee simple estate, to the Vestry of the Parish of the Ascension, and not a trust, and that the only construction of the subsequent clause relating to the control of the said land and buildings by the rector of the parish is that it is an attempt to ingraft upon the fee a naked collateral power to cut down the fee, to which the law will not permit effect to be given.

Mr. Hill, in his work on Trustees, fourth American edition, star page ⁶⁶⁶ 44, says: "Before the relation of trustee can be constituted, there must necessarily exist: 1. A subject matter for a proper trust; 2. A person competent to create a trust; 3. One capable of holding property as trustee; and 4. A person for whose benefit the trust property is held, who is known by the somewhat barbarous appellation of cestui que trust."

In the case at bar the land and buildings devised are proper subject matter for a trust; the deviser is competent to create a trust, and the devisee is capable of taking and holding property as a trustee; but there must still be found within the terms of the devise a cestui que trust. On page 55 Mr. Hill says: "The legal owner of property is prima facie entitled to its beneficial enjoyment, and in order to convert him into a trustee, there must be a sufficient indication of the intention of the parties that he should hold the estate for the benefit of others." To effect this conversion there must be "a proper declaration of the trust, for it is not the legal conveyance or transfer of the property, but the declaration of the trust, that operates in the creation of the trustee": Hill on Trustees, 4th Am. ed., 64.

It is apparent, therefore, that wherever a trust is alleged to be created by any instrument or instruments, there must be a separation of the legal estate from the beneficial enjoyment, and that a trust cannot exist where the same person possesses both. As expressed by Mr. Lewin in his work on Trusts, volume 1, page 14, first American edition: "A trust is a confidence reposed in some other than the cestui que trust,

for which the cestui que trust has no remedy but by subpoena in chancery; . . . for as a man cannot sue a subpoena against himself, he cannot be said to hold upon trust for himself. If the legal and equitable interests happen to meet in the same person, the equitable is forever merged in the legal." Mr. Lewin is equally explicit as to the necessity of a proper declaration of trust, saying on page 83: "It is essential to the creation of a trust that there should be the intention of creating a trust, and therefore, if, upon a consideration of all the circumstances, the court is of the opinion that the settler did not mean to create a trust, the court will not impute a trust where none in fact was contemplated."

⁶⁸⁷ In *Bennett v. Humane Impartial Soc.*, 91 Md. 10, 45 Atl. 888, this court said: "Whilst no set form of words is required to create a trust, if there be an intention to create one, still there must be a manifestation on the face of the will of such an intention before a trust will be declared. The particular circumstances which denote such an intention are necessarily variant; but it may be generally affirmed that where there is a gift to one for the use of another, or where the legatee or devisee is clearly designed to have no beneficial interest in the property given to him, a trust for the benefit of some one was intended to be created, and this conclusion would result either from the words used, or from the legal effect of the instrument itself. In the one case there would be an express declaration of a trust, in the other there would be a trust by construction, but in both it is essential that there should be an intention to create a trust, or none will arise."

It is obvious that there is in this will no express declaration of any trust, and if any can be declared to exist, it must rest upon implication derived from the language of the will, and it is contended by the plaintiffs that the words following the devise to the vestry, viz., "to be used for such church purposes as the rector of said church shall or may direct, it being my purpose and desire that the said land and buildings thereon shall be under the control of the rector of the Ascension Church, and shall be used for such church work as he may deem for the best interest of Ascension Church," creates a trust for indefinite purposes or beneficiaries. Let us see, then, what is meant by the "church purposes" and "church work" which is here referred to. If there were anything in this will to justify the conclusion that Miss Van Bibber meant

thereby general or diocesan missions, or any of the charitable or religious objects which the Christian church at large is concerned in, there might be ground for holding that the Vestry of the Parish of the Ascension of Carroll County was not designed to take the beneficial interest in the property devised to it, and was only designed to be the administrator of its benefits to these indefinite beneficiaries, but this intention must ^{ess} be deduced from some rational and substantial analysis of the will, and not from abstract speculation merely. If the contention of the plaintiffs is to prevail, they will defeat the intention of the testatrix that they should in no event have this particular property, and as was said in *Bennett v. Humane Impartial Soc.*, 91 Md. 10, 45 Atl. 888: "Courts are not, or ought not to be, astute in searching for a construction which nullifies a will if there are other equally reasonable interpretations which uphold it."

In Phillimore's *Eccelesiastical Law*, volume 2, page 1755, the word "church" is said to be derived from the two Greek words "kurion oikos," the "house of the lord," and this plainly appears in the scotch word "kirk." Its primary meaning as given in the *Century Dictionary* is, "an edifice or place of assemblage for Christian worship." Several secondary meanings are there given, conforming to different contexts in which the word is used, among which are the following: "An organized body of Christians belonging to the same city, diocese or province, as the church at Corinth or the Syrian church"; and "a body of Christians worshipping in a particular church edifice or constituting one congregation."

It is in this latter sense that the word is used in the code, article 23, section 206, which provides for incorporating religious societies or congregations generally, and which authorizes them to take and hold property and "to use, lease, mortgage or sell and convey the same in such manner as they shall judge most conducive to the interest of their respective churches, societies or congregations."

It is used in the same sense in the act of 1798, chapter 24, which provides specially for the incorporation of vestries for each of the parishes of the Protestant Episcopal Church in this state. In section 29 of that act it is declared that "no vestry shall sell, alien or transfer any of their estates or property belonging to their church or churches without the

consent of at least five of their body (of which number the rector shall always be one), together with the consent of both the church wardens"; and in section 9 of the same act it is provided that the ^{ess} vestry of each parish, for the time being, shall have an estate in fee simple in all lands, and other property belonging to them, and "shall manage and direct all such property as they may think most advantageous to the interest of the parishioners."

In the case of *Weld v. May*, 9 Cush. 181, the word "church," it was contended, meant an indefinite aggregation of persons, but the court said, "as commonly used in our law, it is synonymous with 'parish' . . . and designates an incorporated society." The references above made to code, article 23, and the act of 1798, chapter 24, are sufficient to show that as the word is used in the law of Maryland, it is synonymous with the corporate entity holding the title to its property. The devise in this will is to "the Vestry of Ascension Church, Ascension Parish, in Westminster, Carroll County, Maryland," and when she added, "to be used for such church work or church purposes as the rector of said church may deem for the best interests of Ascension Church," it is, we think, obvious, in the light of what we have said as to the meaning of the word "church," that she meant "parish" purposes and "parish" work—that is, the purposes and work of the Vestry of the Parish of the Ascension of Carroll County, or, for the corporate work and purposes of the vestry of that parish. This purpose would be sufficiently clear if the last clause in the devise had been omitted, but it is distinctly asserted and emphasized in that clause where the "church work" previously mentioned is declared to be such as the rector should deem best, not for the interest of the church at large, but of Ascension Church.

In *Domestic and Foreign Miss. Soc. of the Protestant Episcopal Church of the United States of America v. Gaither*, 62 Fed. 422, there was a bequest of five thousand dollars to the society above named with a request and desire that it be applied to domestic missions. Judge Morris said: "This society has for its immediate object two purposes—one domestic, the other foreign, missions. It would seem, therefore, that money given to the corporation as this was is not to be held by it upon any trust, but is to be expended by it in the missionary work which it carries on in the United States.

. . . . This is not a case ⁶⁷⁰ in which there is a trust, or trustee and cestui que trust. It is a direct expenditure by the corporation for the very purpose for which it was created. It is, therefore, not within the ruling in *Church Extension Soc. v. Smith*, 56 Md. 362, and is stronger than *Eutaw Place Bap. Church v. Shively*, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. 233, in which the court sustained the validity of the bequest as being one for the corporate use of the donee."

So, in *Look's Case*, 7 N. Y. Supp. 298, a bequest to the American Bible Society, to be used for the promulgation of the Holy Bible, was held to be a gift limited to the very use for which the donee was incorporated, and not a trust for an indefinite beneficiary.

Holding, as we do, that the purposes and uses for which she desired this property to be used were the corporate purposes of the donee, it is immaterial that she wished the rector to determine for which of these corporate uses it should be employed, or whether this was determined by the rector or by the vestry. Inasmuch as the whole beneficial interest in the property is given to the Vestry of the Parish of the Ascension, the true reading of the will is, that the estate given is not an estate given in trust, but one devised to the corporation for its general and corporate purposes: *Bennett v. Humane Imp. Soc.*, 91 Md. 10, 45 Atl. 888; *Woman's Foreign Miss. Soc. v. Mitchell*, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711. The legal estate and beneficial interest, being thus vested in the defendant, the estate it takes is an absolute fee simple. The rector has neither estate nor interest in the subject of the devise, and the power which the testatrix desired to be exercised by him of designating the particular corporate uses to which it should be applied was not to be exercised for his own benefit or that of another, but for that of the vestry alone. It is therefore a naked collateral power, repugnant to the fee devised to the vestry, and for that reason void. As was said in *Smith v. Clark*, 10 Md. 186, "No interest in terms is attempted to be reserved or carved out of the land for any other person, the enjoyment of the whole estate being the benefit intended by the testator there to be conferred upon the devisee," but he attempted to do that which the law will ⁶⁷¹ not permit him to do, namely, to prescribe the mode by which this benefit or property, during all time, was to be enjoyed by the devisee, . . . which would be wholly

inconsistent with a fee simple interest, as well as public policy."

For the reasons assigned the judgment will be affirmed.

Judgment affirmed, with costs to the appellees above and below.

To Constitute an Express Trust, there must be either an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created: *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531. See, too, *Estate of Smith*, 144 Pa. 428, 27 Am. St. Rep. 641; *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373.

To the Constitution of Every Express Trust there must be a trustee, an estate to vest in him, and a beneficiary. If property is devised to persons, to hold in trust for their own benefit, no trust is created, but they take both the legal and the equitable estate; for these two estates cannot be separately maintained in the same persons: *Greene v. Greene*, 125 N. Y. 506, 21 Am. St. Rep. 743.

The Misnomer in a Will of a Legatee or devisee is not material, if the will shows who was intended; and extrinsic evidence is admissible, in case of ambiguity or obscurity, to show who was meant: See the note to *Chappell v. Missionary Society*, 50 Am. St. Rep. 237.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**ROLFE v. LAKE SHORE AND MICHIGAN SOUTHERN
RAILWAY COMPANY.**

[144 Mich. 169, 107 N. W. 899.]

CARRIERS, Connecting, Presumption as to the One on Whose Line Damage Occurred.—Where goods are transported by successive carriers, and an action is brought to recover against the terminal carrier for damage to the goods, it is not enough to show that they were delivered to the initial carrier in good condition, but the plaintiff must further prove that they remained in such condition when received by the defendant. There is no presumption that the damage was suffered on its road rather than on that of the initial carrier. (p. 389.)

Action to recover for injuries to personal property. Judgment for the plaintiff, and the defendant appealed.

Weaver, Morgan & Priddy, for the appellant.

Bird & Sampson, for the appellee.

170 MONTGOMERY, J. The plaintiff's consignor delivered to the Chicago, Burlington and Quincy Railway, at Denver, for shipment to plaintiff at Adrian, Michigan, an automobile of the value of sixteen hundred dollars, in good condition. The car was shipped by the Chicago, Burlington and Quincy Railway in B. & A. car No. 11,601. It was accepted by defendant in the same car in Chicago, and was forwarded in that car to Adrian. On opening the car at Adrian it was found that the automobile had never been braced in the car, and that its motion back and forth on the floor of the car had been guarded against in no other way than by nailing across the car in front of the front wheels and back of the rear wheels a two by four strip; that the automobile had been jolted over these strips, so that any jolting of the car would cause the vehicle to run back and forth on the car floor; that

this had resulted in serious damage. The plaintiff recovered for the entire damage, and defendant brings error.

The questions discussed were saved by appropriate exceptions, and proper assignments of error were duly filed. The important question is whether a case was made meeting the requirements laid down in the two cases of *Marquette etc. R. Co. v. Langton*, 32 Mich. 251, and *Marquette etc. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 461, 7 N. W. 760. These two cases establish the rule for this state that where goods are transported by successive carriers, and an action brought against the terminal carrier for damage to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent upon the plaintiff to show that they were in good order when received by the defendant. We feel ¹⁷¹ bound to adhere to this rule, which has prevailed in this state for more than thirty years.

The plaintiff's counsel does not ask us to depart from the rule of these cases, but insists that he has brought his case within it. The plaintiff's brief assumes that the machine was reloaded by defendant at Chicago. Of this we discover no evidence whatever. On the contrary, the inference is entirely the other way, as the machine came through from Denver to Adrian in the same car. Can it be assumed that the damages to this car were caused by defendant, rather than the initial road? Certainly, there is no proof of the fact. There is no testimony tending to show that this car was subjected to any unusual jolting by defendant while under its control. If the inference be that the automobile was jolted from its insecure position by the ordinary action of a freight train, it should be noted that the car was transported by the initial road a much greater distance than the defendant hauled it, and was subject to the same vicissitudes. The inference is therefore as strong, if not stronger, that the damage was caused by the initial carrier as that it was caused by defendant. It must be held that the proofs failed to fix the responsibility upon defendant.

Judgment reversed, and new trial ordered.

McAlvay, Grant, Blair and Ostrander, JJ., concurred.

The Liability of an Initial Carrier for the torts and negligence of connecting lines is discussed in the note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604; and the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the note to *Beede v. Wisconsin Cent. Ry. Co.*, 101 Am. St.

Rep. 392. It has recently been held, and probably in accordance with the better opinion and weight of authority, that when an initial carrier receives freight in good order, the law presumes that each successive carrier between the first and the last receives it in good order; and that this presumption, working through to the last carrier, who delivers it in bad order, leaves the responsibility with him, unless he can show that the damage occurred prior to his receiving the freight: *St. Louis etc. Ry. Co. v. Coolridge*, 73 Ark. 112, 108 Am. St. Rep. 21.

DETROIT SOUTHERN RAILROAD COMPANY v. MALCOMSON.

[144 Mich. 172, 107 N. W. 915.]

SALE OF PROPERTY F. O. B. Cars, Title to, When Does not Pass to the Purchaser.—Under an agreement for the sale and purchase of all the coal f. o. b. cars which the purchaser may require during a specified year for the use of an illuminating company, mine weights to govern all settlements, no title passes to the purchaser until the coal is delivered on such cars, and he hence cannot recover for the unlawful confiscation of the coal before it arrives at the railroad tracks. Nor is this result affected by the sending of postal cards by the seller to the purchaser announcing the shipment of the coal. (p. 393.)

Assumpsit for freight charges. The defendant interposed a counterclaim for coal confiscated by the plaintiff. The trial court directed a verdict for the plaintiff, and the defendant brought error.

Anderson & Rackham, for the appellant.

Dickinson, Stevenson, Cullen, Warren & Butzel, for the appellee.

172 BLAIR, J. Plaintiff sued defendant for the freight upon certain cars of coal shipped to defendant over plaintiff's railroad by the Superior Coal Company, of Wellston, Ohio, under a contract containing the following clauses:

173 "CONTRACT WITH DEALERS.

"Made at Detroit, this 1st day of July, 1901, between the Superior Coal Co., Wellston, O., the first party, and A. Y. Malcomson, of Detroit, Mich., the second party.

"Said first party agrees to furnish all the coal that may be required by said second party, for the use of The Edison Illuminating Co., of Detroit (with whom the said second party has annual contract), for steam or manufacturing purposes,

until the 30th day of June, 1902, at the following prices, f. o. b. Mich. Cent. R. R., viz.:

"From July 1st, 1901, until June 30th, 1902.

"Mine run, per ton, \$2.05 per net. . . .

"The said second party agrees to purchase from said first party all the mine run coal they may require for the purpose aforesaid, until said 30th day of June, 1902, and to pay for same on or before the 25th day of each month for all coal shipped during the previous month. Mine weights to govern settlements."

Defendant having given notice of setoff, based, among other things, upon the confiscation by plaintiff of numerous cars of coal shipped under said contract, before they arrived at the Michigan Central Railroad tracks, waived the benefit of his plea of the general issue, admitted the plaintiff's claim, and assumed the affirmative of the issue upon his notice of setoff. The court held that defendant's contract provided for a delivery of the coal on the Michigan Central tracks at Detroit, and that the coal having been confiscated before it was so delivered, he had no title thereto, and could not recover for its loss. In accordance with this view of the contract, a verdict was directed for plaintiff.

Defendant contends that the court erred in his construction of the contract; that while the letters, f. o. b., usually import delivery at the point designated, it is apparent that, in the contract in question, delivery of the coal to the plaintiff railroad company was intended by the parties to be a delivery to the defendant, and it is said: "There are two features in this contract strongly indicating this intention: 1. 'Mine weights to govern settlement.' This language means that defendant had to ¹⁷⁴ pay the Superior Coal Company for this coal on the basis of the weights of the coal at the mines where it was delivered on cars for transportation to defendant. . . . 2. The contract provides: 'Said second party agrees to purchase from said first party all mine run coal . . . and to pay for same on or before the twenty-fifth day of each month for all coal shipped during the previous month.'

"The words, 'for all coal shipped during previous month' are also significant, we contend, in that they plainly show when the parties to the contract themselves regarded the responsibility of the Superior Coal Company for the coal shipped under it at an end, and that shipment and delivery

by the Superior Coal Company to defendant were concurrent and not separate acts."

It is also contended that the letters, f. o. b., are used "to qualify, fix and determine a certain essential feature of the contract, viz., the price. The language, 'prices f. o. b.' was not used unadvisedly by the parties to the contract. These words are not synonymous with 'delivery f. o. b.' nor with 'f. o. b.' standing by itself. In interpreting the language, therefore, it should be given that interpretation which the parties themselves sought to put upon it, viz.: The basis of price of the coal, and not the interpretation which plaintiff's counsel and the court below sought to arbitrarily place upon it, viz.: The place of delivery of the coal. Particularly is this so when an entire reading of other portions of the contract, as we have seen, clearly show that a contrary intention as to place of delivery between the parties existed. The language related and was intended by the parties to it to relate entirely to prices, and not to indicate the place where title to the coal passed. It is equivalent to the following: 'At the following prices less freight to Michigan Central R. R.'"; citing *A. J. Neimeyer Lumber Co. v. Burlington etc. R. R. Co.*, 54 Neb. 327, 74 N. W. 670, 40 L. R. A. 534.

The contract is clear and unambiguous and was properly construed by the court. The words, "free on board," in such contracts have acquired a settled judicial meaning: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L. R. A. 756.

There is nothing in the clauses referred to by defendant's counsel or elsewhere in the contract which militates ¹⁷⁵ against the usual meaning of the words; nor was there any evidence outside of the contract to warrant a different construction. The opinion of Commissioner Ragan in the Nebraska case, cited *supra*, supports defendant's contention that the letters, f. o. b., relate to the price merely, but none of the other members of the court concurred with him upon this point, and Norval, J., dissented in an able opinion supported by the citation of numerous authorities. Harrison, C. J., Sullivan, J., and Irvine and Ryan, CC., concurred "in the conclusion reached by Commissioner Ragan, on the ground that, conceding, for the purposes of this case, that the use of the expression 'Prices f. o. b. Omaha' might of itself afford a presumption that the delivery was to be made at Omaha, and that title should there pass, the other evidential facts were suf-

ficient to ground an inference that title should pass at the place of shipment, and the question being one of fact, the finding is sustained by the evidence."

As above stated, there are no such evidential facts in this case requiring a submission of the question to the jury. *Alt-house v. McMillan*, 132 Mich. 145, 92 N. W. 941, is not in conflict with this conclusion. In that case "the correspondence contemplated, and there actually was in this case, in accordance therewith, a bill of lading procured, which, with the invoice attached, was immediately transmitted to the purchaser. This transfer of the bill of lading passed the title to the property in controversy," citing cases.

In the case at bar there was no bill of lading transmitted to defendant. It is claimed that the postal cards sent to defendant, of which the following is an example, were equivalent to a bill of lading, viz.:

"Mine weights govern settlements. All bills due tenth of each month.

"Jackson, Ohio, 10/28, 1901.

"A. Y. M.

"In our office we ship this day on your account:

Initial.	Car No.	Ton.	Grade.	Route.	186.
O. S.	4324	34.50	Lp.	Dt.	5
	6534	32.50	"	"	6
	6753	31.00	"	"	7
	5160	31.50	"	"	8
	5083	32.00	"	"	9

"Mine No. 3.

"Remarks: Weights to follow.

"Yours truly,

"SUPERIOR COAL COMPANY."

Stamped: "Received Oct. 30, 1901. Ansd. ———."

These postal cards were in nowise inconsistent with the construction we have placed upon the contract, and, being construed in harmony with it, were mere notices to the defendant that the coal company, in accordance with the contract, had shipped the coal for delivery to him free on board the cars at Detroit.

The judgment is affirmed.

Carpenter, C. J., and McAlvay, Grant and Montgomery, JJ., concurred.

The Term "F. O. B. Cars" has a definite meaning in the law of sales. A sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for the purchase money, by preserving the right of stoppage in transitu: *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Capehart v. Furman F. L. Co.*, 103 Ala. 671, 49 Am. St. Rep. 60.

WILCKE v. DUROSS.

[144 Mich. 243, 107 N. W. 907.].

JUDGMENT, Relief in Equity Against.—If the process is not served on the defendant, equity has jurisdiction to relieve from the judgment entered against him. (p. 395.)

JUDGMENT, Relief Against in Equity—Amount Involved.—Though a judgment against the defendant is for less than one hundred dollars, yet if under it property is levied upon of much greater value than that sum, equity is not prevented from granting relief on the ground that one hundred dollars is not involved. (p. 395.)

CERTIORARI is not the Proper Remedy for Relief Against a Judgment on the Ground that Process was not Served on the defendant, if the return will not disclose the facts as to the want of such service. (p. 396.)

RELIEF Against a Judgment for Want of Service of Process, Though the Defendant Knew of the Void Service When Made and Failed to Take Any Measures to Prevent the Entry of Judgment Thereunder.—If, in an action, process is served on the defendant's daughter of the same name as herself, and the defendant is at once informed of such service, but does not appear and make any objection, and permits the case to proceed to judgment and a transcript of the judgment to be taken out and levied on her property, whereupon she brings suit in equity for relief, such relief must be granted, but the court has a discretion to refuse to award her costs. (p. 396.)

Suit to set aside a judgment and execution on the ground that the process was not served on the complainant. The trial court dismissed the bill, and the complainant appealed.

Emil W. Snyder, for the complainant.

Haug & Yerkes, for the defendants.

244 MONTGOMERY, J. The defendants Duross and Weber instituted a suit in justice's court to recover of complainant a demand of sixty-five dollars and forty-seven cents. A return of a constable showed service upon complainant.

Duross and Weber proceeded to take judgment for their claim and costs, and later took a transcript to the circuit court, caused execution to be issued and placed in the hands of defendant Dickson, as sheriff, who levied the same upon property of complainant of the value of two thousand dollars or more. Complainant thereupon served notice on Duross and Weber, and also upon the sheriff, stating that the judgment was void for the want of personal service upon her.

Complainant soon after filed this bill setting up the above facts, and also that she had a just and meritorious ²⁴⁵ defense to the claim of Duross and Weber as she was advised by counsel. She prayed that the judgment be set aside and for general relief. An issue was made upon the question of service, and the answer also contained a demurrer clause.

The circuit judge in his opinion found the facts as follows: "Through error on the part of the constable, the summons of the said cause was served upon the daughter of the said complainant, a person by the same name as the complainant. The complainant was informed by her daughter of the service upon her of the said summons on the evening of the service thereof. It appears that the complainant consulted with an attorney, and was advised to pay no attention to the said suit. Complainant was kept advised of the progress of the suit by the attorney; knew of its pendency, and knew that judgment had been entered against her, and took no steps whatever to protect her rights or guard her interests. Sometime during the fall of 1904 levy was made upon her real estate in the city of Detroit, and she thereupon filed this bill"; but refused relief on the authority of *Finn v. Adams*, 138 Mich. 258, 101 N. W. 533.

The circuit judge, in applying that case, proceeded upon the understanding that the judgment there involved was void. This is a mistake. That judgment was admittedly good at law, and it was sought to set up equitable grounds of attack. In this case no jurisdiction was obtained to render judgment as against complainant. That a remedy exists in equity to relieve against such a judgment in a proper case cannot be doubted: 2 Freeman on Judgments, 4th ed., sec. 495.

The objection that one hundred dollars is not involved is answered by the fact that one purpose of the bill is to relieve property of much greater value from a cloud: *Matteson v. Matteson*, 132 Mich. 516, 93 N. W. 1079.

Certiorari would not have been an appropriate remedy, as no return would have disclosed the true facts: *O'Connor v. White*, 124 Mich. 22, 82 N. W. 664.

²⁴⁶ The complainant was entitled to relief. The testimony shows, however, that complainant knew of the service on her daughter on the day it was made, that an attorney was consulted on her behalf at once, and that instead of appearing and making objection she permitted the case to proceed to judgment, and permitted the transcript to be sued out, and permitted the levy to be made before taking any proceedings. While we cannot say that she by her inaction conferred jurisdiction upon the justice, we do hold that when one voluntarily chooses a remedy which is designed or the necessary effect of which is to impose large costs upon his adversary, when a simple, inexpensive remedy is open, the court will, in the exercise of its discretion as to costs, take into account the oppressive conduct of the complainant.

The decree will be entered for complainant, but without costs of the lower court, and for actual disbursements only in this court, exclusive of a solicitor's fee.

McAlvay, Grant, Blair and Moore, JJ., concurred.

Relief in Equity, Other than by Appellate Proceedings, Against Judgments, decrees, and other judicial determinations is considered in the note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218. An action in equity to set aside a judgment at law, although not collateral is an indirect attack, as distinguished from a direct attack by appeal: *Le Mesnager v. Variel*, 144 Cal. 463, 103 Am. St. Rep. 91. It has been held that to obtain relief in equity against a judgment on the ground that process was not served on the defendant, he must show that he did not have actual notice of the proceeding before the judgment was entered and that he had a meritorious defense: *Preston v. Kindrick*, 94 Va. 760, 64 Am. St. Rep. 777. For subsequent cases on the falsity of the return of process as a ground for relief in equity from judgments, see *McClung v. McWhorter*, 47 W. Va. 150, 81 Am. St. Rep. 785; *Dowell v. Goodwin*, 22 R. I. 287, 84 Am. St. Rep. 842; *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738.

BROTHERTON v. GILCHRIST.

[144 Mich. 274, 107 N. W. 890.]

PARTNERSHIP—Agreement for Joint Adventure and a Sharing of the Profits, When does not Create.—An agreement between B., T., and G., that they will engage in raising sugar beets, that T. is to manage the enterprise and receive therefor a stated sum, that B. is to contribute his counsel and advice, that G. is to advance the capital, that the profits shall be equally divided among the three, that G. shall receive no return of his advances until all the other obligations are met, and in case there is not enough to meet these, B. and T. will each be responsible for one-third of the deficiency, does not make G. a partner, and an action cannot be sustained against him as such where it was clearly understood that neither of the others had any authority to make contracts which would bind G., nor the authority to make contracts to bind them, and that his liability should be limited to his advances. (p. 399.)

PARTNERSHIP, When Created and When not.—Though there is a partnership whenever there is a community of property, of interest, and of profits, there is no partnership if any of these elements is missing. (p. 399.)

William H. Aitken, for the defendant Sanilac Sugar Refining Company.

C. F. Gates, for the defendant Trowbridge.

George P. Codd and Thomas A. E. Weadcock, for the defendant Gilchrist.

275 CARPENTER, C. J. This is a suit in equity for a partnership accounting. The business of the partnership was that of raising sugar beets in the county of Huron in the year 1902. Complainant, defendant Trowbridge, and defendant Gilchrist each was interested in this business. Complainant and Trowbridge were partners in said business, and the important question in the case is whether Gilchrist was also a partner. The trial court decided that he was not, and entered a decree in accordance with that decision. From that decree defendants Trowbridge and the Sanilac Sugar Refining Company (a creditor of the partnership) appeal.

They maintain that the trial court erred in deciding that Gilchrist was not a partner. The circumstance that the Sugar Refining Company stands in the relation of a creditor to the partnership is unimportant. For it is not claimed that the credit owned by that company was so extended as to make Gilchrist liable therefor unless he was in fact a partner. We

have, then, to consider only this question, viz.: Was Gilchrist actually a partner? The only witnesses sworn in the case were defendant Trowbridge and one Andrew Wilson. In determining the case we have to consider only their testimony and certain letters, some of which were written by Trowbridge and some by Gilchrist. This testimony clearly proves that Brotherton, Trowbridge and Gilchrist entered into a joint venture to raise sugar beets; that Trowbridge was to manage the enterprise and receive therefor the sum of one hundred and fifty dollars per month; that Brotherton was to contribute his counsel and advice; that Gilchrist was to advance capital to the amount of ten thousand dollars; that the enterprise was to be ²⁷⁶ carried on under the name of Brotherton and Trowbridge; that Gilchrist's connection with the venture should not be disclosed; and that the profits should be divided equally among the three interested parties. It also appears from a letter written by defendant Trowbridge to his codefendant the Sugar Refining Company that Gilchrist should "receive no return of his advances until all other obligations are met. In case there is not enough left to meet these advances by the silent partner, Mr. Brotherton and I each agree to be responsible for one-third of the deficit." Gilchrist did in fact advance twenty-two thousand six hundred and fifty dollars. The venture proved unsuccessful and he has lost this entire amount, unless he can collect a part of it from his associates. Though he made various suggestions to Trowbridge, Gilchrist took no active part in the business management of the venture. He did, however, on one occasion give directions or suggestions "about plowing where Brotherton and Trowbridge were raising beets," and on another occasion directed or suggested that certain employes be discharged.

The law governing this case is stated in the leading case of *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785, as follows: "Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of

the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business": See, also, *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N. W. 761; *Dutcher v. Buck*, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776. Under this rule parties interested in a joint venture are not partners unless one of them has (to ²⁷⁷ quote other language from the opinion in *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785) "clothed the other with an agency to act on his behalf in this business." Tested by this rule there was no partnership. For it is clearly established by the correspondence in this record that neither Brotherton nor Trowbridge had authority to make contracts which would bind Gilchrist. It was clearly understood that the liability of Gilchrist should be limited to his advances. Neither had Gilchrist authority to make contracts which would bind Brotherton and Trowbridge. It is true Trowbridge testifies that Gilchrist referred to himself as "a silent partner," and Wilson gives similar testimony. This, if we had no other testimony, might be convincing, but, under the circumstances, we think that it is merely an instance of the use of inexact words to describe a relation which was not that of a partner. It is also true that after the partnership business was ended, Gilchrist at one time announced to Trowbridge his purpose of paying all outstanding accounts. This announcement was accompanied by no admission of liability, and did not enlarge his obligation.

Nor is this case within the principles of *Dutcher v. Buck*, 96 Mich. 160, 55 N. W. 676. The most that can be claimed for that case is that it decides that a partnership exists if there is "community of property, community of interest and community of profits." That decision is not applicable if a single one of these elements is lacking. It does not apply if there is not community of property: See *Canton Bridge Co. v. City of Eaton Rapids*, 107 Mich. 613, 65 N. W. 761. In the case at bar all the evidence in the record bearing on the question of community of property in the beet crop is this statement (in a letter written by defendant Trowbridge to his codefendant, the Sugar Refining Company) "the silent partner (meaning defendant Gilchrist) has no claim whatsoever upon the crop." We are bound to say, therefore, that there was no community of property, and that the decision of *Dutcher*

v. Buck, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776, is inapplicable.

In my judgment, the trial court correctly decided that ²⁷⁸defendant Gilchrist was not a partner of complainant and of defendant Trowbridge, and the decree appealed from should be affirmed.

McAlvay and Ostrander, JJ., concurred.

Blair and Moore, JJ., concurred in the result.

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1. General Definitions Given of Partnership.

Though the courts have from time to time formulated general definitions of a partnership, still it is often found that such definitions are inadequate in some cases. The difficulty arises in making a definition which will be equally applicable to controversies arising between parties who are alleged to be partners and controversies between alleged partners and creditors of the partnership. It may often happen that parties who are not partners inter se may still be partners with respect to creditors by reason of having by their acts authorized the creditors to consider and rely upon them as partners.

Chancellor Kent in his Commentaries defines a partnership as "a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions": 3 Kent's Commentaries, 23. And it has been said that where persons associate themselves together to carry on a joint business for their common benefit, to which each contribute either property or services, and the profits arising therefrom are to be shared between them, it constitutes a partnership: *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358. And likewise a combination of property, labor and skill in an enterprise or business as principal for joint profit has been declared to be a partnership as between the parties: *McDonald v. Campbell*, 96 Minn. 87, 104 N. W. 760; *Spaulding v. Stubbings*, 86 Wis. 255, 39 Am. St. Rep. 888, 56 N. W. 469. So, also, it has been declared that a partnership is a voluntary contract between two or more persons who place their money, effects, labor and skill, or some or all of them, into lawful commerce or business, with the understanding that there shall be a community of profits between them: *Carter v. McClure*, 98 Tenn. 109, 60 Am. St. Rep. 842, 38 S. W. 585, 36 L. R. A. 282.

In *Goldsmith v. Eichold*, 94 Ala. 116, 33 Am. St. Rep. 97, 10 South. 80, the court, in discussing the essential characteristics, said: "Part-

nership is not necessarily an entire merger of the individual, his labor, energy, or estate in the firm. The extent of the merger is determined by the agreement entered into, and the purpose the partners have in view. Anything left out of the partnership agreement and its views, whether it be money, property, labor or skill, pertains to the individual in as absolute right as if there had been no contract of partnership. The merger of the individual into the firm or company extends to and includes everything embraced, expressly or impliedly, in the terms of the agreement, and to that extent changes the character of his ownership. The individual parts with the separate right and power to manage, direct, and control that of which, before that time, he had been supreme arbiter. His dominion was an integer. It becomes a fraction. He surrenders to the partnership an interest in his property, labor, skill, energy, one or more, as the agreement may bind him by express or implied stipulations, in consideration of a corresponding surrender, to like extent and for like purposes, by his copartners. The agreement consummated, each partner becomes seised and rightfully possessed of the same interest in and power over whatever has been contributed to the firm by his copartners as he retains in that contributed by himself. This, and no more.

"These properties of partnership render it eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee: a trustee for the newly created entity, the partnership, and for each member of the firm, who thus becomes a beneficiary under the trust. He is more: he is a trustee, and a cestui que trust. A trustee, so far as his own duties bind him; a cestui que trust, so far as duties rest on his copartners. And it is sometimes said that each partner is both a principal and an agent; a principal to the extent he represents his own interests, but an agent only so far as he represents his copartners.

"The first duty devolved by this trust on each of the partners is to apply the partnership effects to the payment of the debts of the partnership, and not to pervert them to individual uses or wants, without the consent of the copartners. Any attempt to so pervert them, whether by private arrangement or under judicial proceedings, can be intercepted by the nonconsenting partners. This, on the plain principle that, being beneficiaries under the trust, they have a clear right to prevent its breach.

"The trust goes further. After discharging all the partnership liabilities, the residuum is still held in trust for partition or distribution among the several partners, according to their several interests; and the same rights and remedies exist to preserve, protect, and secure the proper administration of the trust fund to this end as are given in enforcing the payment of debts."

But a mere participation in the profits and loss of an enterprise does not necessarily constitute a partnership among the participat-

ing parties. The relation of partnership inter se is a question of intention on the part of the alleged partners, and this intention is to be determined from all the circumstances of the case: *McDonald v. Matney*, 82 Mo. 358.

The tests by which it is determined that a partnership exists between the parties has long been a matter upon which the courts have differed. The doctrine of the earlier English cases seems to have been disapproved by the later cases. These divergent views are shown in the discussion on this branch of the subject, found in *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126. The court in that case observed: "As to partnership liability, it was formerly broadly laid down that everyone who shared in the profits of a trade or business ought also to bear his share of the losses, for the reason that, by taking a part of the profits, he takes a part of the fund of the business, upon which the creditors had a right to rely for payment. This was the rule announced in the case of *Waugh v. Carver*, 2 H. Black. 235. In the application of this rule the courts began to add qualifications, and to make distinctions that were not of easy application. It was said, in some cases, that a sharing in the profits, in order to render one liable as partner, must be a participation therein as principal, and the test applied in other cases was that the party entitled to a part of profits was a partner, if he had a lien thereon as against the private creditors of the other members of the firm. The question was very much discussed in England in the case of *Cox v. Hickman*, 8 H. L. Cas. 268, and it seems to be generally conceded that this case modified materially the rule formerly announced on the subject. It is said of this case that it brought back the English law to the true rule. The facts, in brief, were, that two merchants became embarrassed and assigned their partnership property to trustees, with direction and authority for them to carry on the business in a new name, and pay the net profits ratably among the creditors of the assignors, and, after the creditors were paid, the residue to go to the assignors. The creditors joined in the deed of assignment, and a majority of them had authority to make rules for the conduct of the business, or to end it if they saw proper. Debts were contracted by the trustees in conducting the business under this management, and it was held that the creditors were not liable as partners for the debts. Several opinions were rendered in the case, and those of the majority do not seem to rest upon the same grounds. It has been considered that the decision put the liability of one partner for the acts of his copartner upon the doctrine of the liability of a principal for the acts of his agents, the test of liability being in the fact that one has authorized the managers of the business to carry it on for him, and that, while the right to participate in the profits was cogent, it was not conclusive, evidence that the business was carried on in part for the person receiving a part of the

profits. There is found in the books a great deal of discussion on the subject of partnership liability. The following authorities, among the many, contain a thorough review of the decisions on the old rule, as it is called, and the modifications thereof: *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Denny v. Cabot*, 6 Met. 82; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36 L. ed. 835; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785. This court in the case of *Dubos v. Hoover*, 25 Fla. 720, 6 South. 788, quoted with approval the definition of a partnership given by Judge Story, viz.: 'Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them': *Story on Partnership*, 6th ed., sec. 2. It seems that when Judge Story wrote his book on Partnership he conceived the liability of one sought to be charged as a partner to rest upon the law of principal and agent, and his view is quoted with approval in one of the opinions delivered in the case of *Cox v. Hickman*, 8 H. L. Cas. 268.

"A reference to agency as a test of partnership has not, it seems, proven a correct guide in many cases, as agency results from partnership, rather than partnership from agency. It is said in *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36 L. ed. 835: 'Such a test seems to give a synonym, rather than a definition, another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner who stands in the relation of principal to those by whom the business is actually carried on adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.' In this case it is said: 'The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.' Judge Cooley says for the court, in *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 185: 'That in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of a partnership are to be formed.' The same view is announced in the recent

English case of *Mollwo v. Court of Wards*, L. R. 4 P. C. App. Cas. 419. And in section 49 of his work on Partnership, Judge Story says: "In short, the true rule, *ex aequo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern in all the cases. If they intended a partnership in the capital stock or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement was unknown to them. And, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons.' "

The definition of a partnership given by Justice Story in his work on Partnership, and which is quoted by the court in the extract from the case above, has been substantially adopted in the following cases: *Stone v. Boone*, 24 Kan. 337; *Post v. Kimberly*, 9 Johns. 470; *Niagara County v. People*, 7 Hill, 504; *Harvey v. Childs*, 28 Ohio St. 321, 22 Am. Rep. 387; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *Galveston etc. R. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 301; *Berthold v. Goldsmith*, 24 How. 536, 16 L. ed. 762; *Hunt v. Oliver*, 118 U. S. 210, 6 Sup. Ct. Rep. 103, 30 L. ed. 128.

In *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36 L. ed. 835, the court, after an exhaustive discussion of English decisions, both prior and subsequent to the leading case of *Cox v. Hickman*, 8 H. L. Cas. 268, observed: "In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

"In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not

thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee: *Perrine v. Hankinson*, 11 N. J. L. 181; *Holmes v. Old Colony R. Corp.*, 5 Gray, 58; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect: *Wilson v. Edmonds*, 130 U. S. 472, 9 Sup. Ct. Rep. 563, 32 L. ed. 1025; *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267; *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Cassidy v. Hall*, 97 N. Y. 159; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Williams v. Soultter*, 7 Iowa, 435; *Boston & C. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Mollwo v. Court of Wards*, L. R. 4 P. C. 419, and *Badeley v. Consolidated Bank*, 38 Ch. Div. 238, above cited."

A partnership has recently been defined as a relation subsisting between persons who have combined their property, labor and skill in an enterprise or business, as principals, for the purpose of joint profit: *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S. E. 124. We believe that there is great force in the observation of Lord Wensleydale in *Cox v. Hickman*, 8 H. L. Cas. 268, to the effect that "the law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view."

If we were to venture a definition of a partnership, we would say that a partnership exists where two or more persons, each of whom acting as principal for himself and agent for his associates, combine their property, labor or skill in a lawful enterprise or business as principals for the purpose of joint profit.

A partnership is created only by a contract, express or implied: *Dunham v. Loverock*, 158 Pa. 197, 38 Am. St. Rep. 838, 27 Atl. 990. "A partnership is not like a corporation, from which certain consequences necessarily follow. As to the parties to it the contract of partnership is like any other and the powers conferred, duties enjoined, and liabilities imposed are to be deduced from its terms. This idea was expressed by Mr. Justice Lindley in *Walker v. Hirsch*, 27 Ch. Div. 460. He said: 'Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words; their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered'": *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147.

It is not necessary that the parties adopt a firm name: *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850. Nor is it necessary that the agreement of partnership be for any definite term: *Fruin v. Chotzinoff*, 79 Conn. 65, 63 Atl. 782. What will constitute a partnership is a question of law, but whether the facts which constitute the part-

nership do exist is a question for the jury: *Deputy v. Harris*, 1 Marv. (Del.) 100, 40 Atl. 714; *Jones v. Purnell* (Del.), 62 Atl. 149; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026.

II. Distinction Between Partnership and Joint Tenancy and Cotenancy.

Although partnerships and cotenancies have many points of similarity, the main difference between them lays in the termination of the relation and the methods by which a partner and a cotenant may dispose of his individual interest. Partnerships differ from joint tenancies in that there is no right of survivorship between the partners: *Cowles v. Garrett's Admrs.*, 30 Ala. 341; *Bradley v. Harkness*, 26 Cal. 69; *La Societ  Francaise etc. v. Weidmann*, 97 Cal. 507, 32 Pac. 538; *Sims v. Dame*, 113 Ind. 127, 15 N. E. 217; *Goell v. Morse*, 126 Mass. 480; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309; *Farrand v. Gleason*, 56 Vt. 633; *Hungerford v. Cushing*, 8 Wis. 332.

III. Distinction Between Partnerships and Joint Adventures.

A joint adventure is generally regarded as of a similar nature to that of a partnership and governed by the same rules applicable to partnerships: *Slater v. Clark*, 68 Ill. App. 433; *Doane v. Adams*, 15 La. Ann. 350; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Marston v. Gould*, 69 N. Y. 220; *Ross v. Willett*, 76 Hun, 211, 27 N. Y. Supp. 785. A joint adventure generally relates to a single transaction: *Pickerell v. Fisk*, 11 La. Ann. 277; *Alderton v. Williams*, 139 Mich. 296, 102 N. W. 753; *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; *Felbel v. Kahn*, 29 App. Div. 270, 51 N. Y. Supp. 435. The usual test of partnership as between the parties in a joint adventure is the intent to become partners: *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625, 28 South. 755.

IV. Distinction Between a Partnership and a Joint Stock Company.

At common law, joint stock companies are regarded as partnerships and are governed by the same general rules applicable to partnerships, but the status of joint stock companies is often regulated by statutory provisions: *Montgomery v. Elliott*, 6 Ala. 701; *Smith v. Fagan*, 17 Cal. 178; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Pettis v. Atkins*, 60 Ill. 454; *Pipe v. Bateman*, 1 Iowa, 369; *Frost v. Walker*, 60 Me. 468; *Phillips v. Blatchford*, 137 Mass. 510; *Ricker v. American Loan etc. Co.*, 140 Mass. 346, 5 N. E. 284; *Butterfield v. Beardsley*, 28 Mich. 412; *Willson v. Owen*, 30 Mich. 474; *Boisgerard v. Wall*, *Smedes & M. Ch.* 404; *Atkins v. Hunt*, 14 N. H. 205; *Wells v. Gates*, 18 Barb. 554; *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 286; *McFadden v. Leeka*, 48 Ohio St. 513, 28 N. E. 874; *Hedge's Appeal*, 63 Pa. 273; *Shamburg v. Abbott*, 112 Pa. 6, 4 Atl. 518; *Walker v. Wait*, 50 Vt. 668; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *Kimmins v. Wilson*, 8 W. Va. 584; *Werner v. Leisen*, 31 Wis. 169.

A distinction, however, exists between a joint stock company and an ordinary partnership, in that the death of a member does not ordinarily dissolve the joint stock company where it does have that effect in an ordinary partnership. And in a joint stock company there is no *delectus personae* as in the ordinary partnership: *Machinists' Nat. Bank v. Dean*, 124 Mass. 81; *McNeish v. Hulleas Oat Co.*, 57 Vt. 316; *Baird's Case*, L. R. 5 Ch. App. 725.

V. Purposes for Which a Partnership may be Formed.

a. **Necessity for Object of the Partnership to be for Pecuniary Gain.**—"The fundamental idea of a partnership *inter sese* is that it is formed for the purpose of trade or gain in business, and that each has the right to participate in the profits": *Missouri Bottlers' Assn. v. Fennerty*, 81 Mo. App. 525. Hence organizations, the objects of which are social, literary, scientific or political advancement, and not pecuniary gain, are not regarded as partnerships: *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436, 19 N. W. 911; *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716; *McMahon v. Ranke*, 47 N. Y. 67; *Lafond v. Deems*, 81 N. Y. 507; *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919; *Ash v. Guie*, 97 Pa. 493, 39 Am. Rep. 818; *Winona Lumber Co. v. Church*, 6 S. Dak. 498, 62 N. W. 107. But voluntary associations for mutual relief in sickness or distress by means of funds raised by initiation fees, dues and the like, are regarded as partnerships: *Gorman v. Russell*, 14 Cal. 531; *Babb v. Reed*, 5 Rawle, 158, 28 Am. Dec. 650; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Pierce v. Piper*, 17 Ves. 15.

But an organization for religious and social purposes, the members putting their property in common and living as one family, and having no business for common benefit and profit, is not a partnership: *Teed v. Parsons*, 202 Ill. 455, 66 N. E. 1044. Likewise an arrangement between several persons to keep house together in order to diminish expenses, one party to pay the rent and meat bills, another to pay all other bills, constitutes no partnership: *Austin v. Thomson*, 45 N. H. 113. A mere agreement to hold land in common constitutes no partnership: *Huckabee v. Nelson*, 54 Ala. 12; *Gilmore v. Black*, 11 Me. 485; *Treiber v. Lanahan*, 23 Md. 116; *Sikes v. Work*, 6 Gray, 433; *Ballou v. Spencer*, 4 Cow. 163; *White v. Fitzgerald*, 19 Wis. 480.

b. **Effect Where Formed for a Single Transaction or Venture.**—A partnership may exist for a single transaction, venture or undertaking: *Harris v. Umsted* (Ark.), 96 S. W. 146; *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754; *Plunkett v. Dillon*, 4 Houst. 338; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Cochran v. Anderson County Nat. Bank*, 83 Ky. 36; *Ripley v. Colby*, 23 N.

H. 438; *Clark v. Rumsey*, 59 App. Div. 435, 69 N. Y. Supp. 102; *Demarest v. Koch*, 129 N. Y. 218, 29 N. E. 296; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Yeoman v. Lasley*, 40 Ohio St. 190; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Pierson v. Steinmyer*, 4 Rich. 309; *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118; *Williams & Co. v. Nigh*, 58 W. Va. 639, 53 S. E. 124.

c. **Effect Where Formed to Buy or Speculate in Land.**—A partnership may be formed for the purpose of buying, dealing or speculating in lands: *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; *Winstanley v. Gleyre*, 146 Ill. 27, 34 N. E. 628; *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Dudley v. Littlefield*, 21 Me. 418; *Winslow v. Young*, 94 Me. 145, 47 Atl. 149; *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611; *Menage v. Burke*, 43 Minn. 211, 19 Am. St. Rep. 235, 45 N. W. 155; *Hunter v. Whitehead*, 42 Mo. 524; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Williams v. Gillies*, 75 N. Y. 197; *Mitchell v. Tonkin*, 109 App. Div. 165, 95 N. Y. Supp. 669; *Ludlow v. Cooper*, 4 Ohio St. 1; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118. An agreement to co-operate in the sale of land on which one of the parties holds an option and to share profits constitutes a partnership: *Frazer v. Linton*, 183 Pa. 186, 38 Atl. 589.

A partnership to deal in real estate may be formed by parol agreement: *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Fountain v. Menard*, 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601.

d. **Effect of Illegal Purpose of Partnership.**—Where the object of the partnership is the prosecution of an illegal business or one which is contrary to public policy, the partnership agreement is void: *Powell v. Maguire*, 43 Cal. 11; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Tenney v. Foote*, 95 Ill. 99; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Spaulding v. Nathan*, 21 Ind. App. 122, 51 N. E. 742; *Anderson's Admr. v. Whetlock*, 2 Bush, 398, 92 Am. Dec. 489; *Stewart v. McIntosh*, 4 Har. & J. 233; *Spies v. Rosenstock*, 87 Md. 14, 39 Atl. 268; *Sampson v. Shaw*, 101 Mass. 145, 3 Am. Rep. 327; *Dunham v. Presby*, 120 Mass. 285; *McGunn v. Hanlin*, 29 Mich. 476; *Durant v. Phenes*, 26 Minn. 362, 4 N. W. 610; *Shriver v. McCloud*, 20 Neb. 474, 30 N. W. 534; *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Tucker v. Adams*, 63 N. H. 361; *Watson v. Murray*, 23 N. J. Eq. 257; *Kelly v. Devlin*, 58 How. Pr. 487; *Warner v. Griswold*, 8 Wend. 665; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Dudley*

v. Little, 2 Ohio, 504, 15 Am. Dec. 575; Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Jackson v. Akron Brick Assn., 53 Ohio St. 303, 53 Am. St. Rep. 638, 41 N. E. 257, 35 L. R. A. 287; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159; Wiggins v. Bisso, 92 Tex. 219, 71 Am. St. Rep. 837, 47 S. W. 637; Watson v. Fletcher, 7 Gratt. 1; Fairbank v. Newton, 50 Wis. 628. The illegality of the purpose of the partnership must, however, plainly appear: Delamour v. Roger, 7 La. Ann. 152; Williams v. Connor, 14 S. C. 621; Whitcher v. Morey, 39 Vt. 459; Fairbank v. Leary, 40 Wis. 637; Thwaites v. Coulthwaite, [1896] 1 Ch. 496.

Where a partnership is sought to be formed for several purposes, and only one of the purposes of the partnership is illegal, the partnership will be sustained if the illegal object can be clearly separated from the legal objects of the partnership: Northrup v. Phillips, 99 Ill. 449; Anderson v. Powell, 44 Iowa, 20; Dunham v. Presby, 120 Mass. 285; Willson v. Owen, 30 Mich. 474; Todd v. Rafferty's Admrs., 30 N. J. Eq. 254; Lane v. Thomas, 37 Tex. 157; Whitcher v. Morey, 39 Vt. 459. So, also, where, in order to conduct a certain business, it is necessary that the person conducting the business be legally qualified to do so. A partnership between persons legally qualified and one who is not so qualified is not illegal where the business is to be conducted by the legally qualified persons: Harland v. Lillenthal, 53 N. Y. 438.

VI. Between Whom a Partnership may be Formed.

a. **In General.**—A partnership may exist between tenants in common of lands in conducting business on the land without affecting the legal status of the land: Holton v. Guinn, 76 Fed. 96.

An infant may enter into a partnership agreement: Mehlhop v. Rae, 90 Iowa, 30, 51 N. W. 650; Vinsen v. Lockard, 7 Bush, 458; Bush v. Linthicum, 59 Md. 344; Dana v. Stearns, 3 Cush. 372; Osborn v. Farr, 42 Mich. 134, 3 N. W. 299; Goodnow v. Empire Lumber Co., 31 Minn. 468, 47 Am. Rep. 798, 18 N. W. 283; Kerr v. Bell, 44 Mo. 120; Gay v. Johnson, 32 N. H. 167; Continental Nat. Bank v. Strauss, 137 N. Y. 148, 32 N. E. 1066; Bixler v. Kresge, 169 Pa. 405, 47 Am. St. Rep. 920, 32 Atl. 414; Miller v. Sims, 2 Hill, 479; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

b. **Between Several Partnerships.**—One partnership firm may enter into partnership with another partnership firm: Mayrant v. Marston, 67 Ala. 453; Bullock v. Hubbard, 23 Cal. 495, 83 Am. Dec. 130; Butler v. American Toy Co., 46 Conn. 136; Willson v. Morse, 117 Iowa, 581, 91 N. W. 823; Meador v. Hughes, 14 Bush, 652; Simonton v. McLain, 37 La. Ann. 663; Gage v. Rollins, 10 Met. 348; Gulick v. Gulick, 14 N. J. L. 578; Willey v. Renner, 8 N. Mex.

641, 45 Pac. 1132; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812; *In re Hamilton*, 1 Fed. 800.

c. **Between Several Corporations or a Corporation and an Individual**.—The weight of authority is against the existence of an implied power on the part of a corporation to enter into a partnership agreement with another corporation or an individual. This power is generally deemed on the ground of public policy, since in a partnership the corporation would be bound by the acts of persons who are not its duly appointed and authorized agents and officers: *Central R. & B. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Gunn v. Central R. R.*, 74 Ga. 509; *Ledgiger v. Central Line Steamers*, 75 Ga. 567; *Marine Bank v. Ogden*, 29 Ill. 248; *Mestier & Co. v. Chevalier P. Co.*, 108 La. Ann. 562, 32 South. 520; *Conkling v. Washington University*, 2 Md. Ch. 497; *Commonwealth v. Smith*, 10 Allen, 448, 87 Am. Dec. 672; *Hanson v. Paige*, 3 Gray, 239; *Wittenden Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 681; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Aurora Bank v. Oliver*, 62 Mo. App. 390; *Van Keuren v. Trenton L. & M. Mfg. Co.*, 13 N. J. Eq. 302; *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Bissell v. Michigan etc. R. Co.*, 22 N. Y. 258; *People v. North River etc. Co.*, 121 N. Y. 582, 18 Am. St. Rep. 843, 24 N. E. 834, 9 L. R. A. 33; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279, 15 L. R. A. 145; *Geurnick v. Alcott*, 66 Ohio St. 94, 63 N. E. 714; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598, 88 S. W. 396; *Lamoille V. R. Co. v. Bixby*, 55 Vt. 235; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. ed. 950. But the courts often enforce partnership liability upon corporations under the same circumstances under which such a liability would be enforced upon an individual, even though the individual was not a partner as between the other members of the alleged partnership: *Butler v. American Toy Co.*, 46 Conn. 136; *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152, 34 N. W. 156; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Cameron v. Ford etc. Bank (Tex.)*, 34 S. W. 178; *Johnson v. Weed etc. Co.*, 103 Wis. 291, 79 N. W. 236.

d. **Between Husband and Wife**.—At the common law a married woman, being incapable of entering into a contract, was naturally incapable of becoming a member of a partnership: *Brown v. Jewett*, 18 N. H. 230; *Carey v. Burress*, 20 W. Va. 571, 43 Am. Rep. 790. But under the prevailing statutes removing the common-law disabilities of married women, she may enter into agreements of copartnership: *Abbott v. Jackson*, 43 Ark. 212; *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Dupuy v. Sheak*, 57 Iowa, 361, 10 N. W. 731; *Plumer v. Lord*, 5 Allen, 460; *Vail v. Winterstein*, 94 Mich. 230, 34 Am. St. Rep. 334, 53 N. W. 932, 18 L. R. A. 575; *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep.

362; *Zimmerman v. Erhard*, 8 Daly, 311; *Little v. Hazlett*, 197 Pa. 591, 47 Atl. 855. But it has frequently been held under statutes of that general character, that the wife cannot enter into a partnership with her husband: *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 294, 35 Am. Rep. 105, 19 S. W. 747, 16 L. R. A. 526; *Mayer v. Soyster*, 30 Md. 402; *Bowker v. Bradford*, 140 Mass. 521, 5 N. E. 480; *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, 40 N. W. 907, 2 L. R. A. 343; *Payne v. Thompson*, 44 Ohio St. 192, 5 N. E. 654; *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 32 Pac. 224, 16 L. R. A. 530; *Fuller v. McHenry*, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512. But in some jurisdictions, it has been held that she may enter into partnership with her husband: *Dressel v. Lonsdale*, 46 Ill. App. 454; *Louisville etc. Co. v. Alexander (Ky.)*, 27 S. W. 981; *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396; *Suan v. Caffé*, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593.

VII. Necessity for a Consideration as Between the Alleged Partners.

In order to make an agreement for a partnership valid, there must be a valid consideration existing as between the partners. This consideration may, however, be founded on either the mutual promises of the respective parties or their contributions of either property, labor or skill toward the common enterprise: *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Trayes v. Johns*, 11 Colo. App. 219, 52 Pac. 1113; *Mitchell v. O'Neale*, 4 Nev. 504; *Coleman v. Eyre*, 45 N. Y. 38; *Emery v. Wilson*, 79 N. Y. 78; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Belcher v. Conner*, 1 S. C. 88; *Kimmins v. Wilson*, 8 W. Va. 584; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918; *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530.

VIII. Necessity for Intent on Part of the Alleged Partners to Form a Partnership.

A partnership as between the parties is always created by a voluntary agreement of the parties and not by operation of law alone: *Causler v. Wharton*, 62 Ala. 358; *Haycock v. Williams*, 54 Ark. 384, 16 S. W. 3; *Morgan v. Farrell*, 58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. 614; *Bushnell v. Consolidated Ice M. Co.*, 138 Ill. 67, 27 N. E. 596; *Miller v. Hughes*, 1 A. K. Marsh. 181, 10 Am. Dec. 719; *Halliday v. Bridewell*, 36 La. Ann. 238; *Ingals v. Ferguson*, 59 Mo. App. 299; *Groves v. Tallman*, 8 Nev. 181; *Wilson's Exrs. v. Cobb's Exrs.*, 28 N. J. Eq. 177; *Dawson v. Pogue*, 18 Or. 94, 22 Pac. 637, 6 L. R. A. 176; *Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *Cock v. Evans' Heirs*, 9 Yerg. 287; *Setzer v. Beale*, 19 W. Va. 274; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918. There must be an agreement, either express or implied: *Savannah etc. Co. v. Sabel (Ala.)*, 40 South. 88; *Providence Mach.*

Co. v. Browning, 72 S. C. 424, 52 S. E. 117. And of course the agreement need not be in writing: Simmons v. Ingram, 78 Mo. App. 603.

The relation of partnership as between the parties being one of contract, it has always been the rule that, as between the parties, the intent of the parties to create a partnership relation as between themselves is essential to constitute the parties partners: Couch v. Woodruff, 63 Ala. 466; Culley v. Edwards, 44 Ark. 423, 51 Am. Rep. 614; Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Niehoff v. Dudley, 40 Ill. 406; National Surety Co. v. T. B. Townsend etc. Co., 176 Ill. 156, 52 N. E. 938; Noyes v. Toottle, 2 Ind. Ter. 144, 48 S. W. 1031; Macy v. Combs, 15 Ind. 469, 77 Am. Dec. 103; Ruddick v. Otis, 33 Iowa, 402; Halliday v. Bridewell, 36 La. Ann. 238; Leonard v. Sparks, 109 La. 543, 33 South. 594; Heise v. Barth, 40 Md. 259; Cannon v. Brush Electric Co., 96 Md. 446, 94 Am. St. Rep. 584, 54 Atl. 121; Gunnison v. Langley, 3 Allen, 337; Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; Runnels v. Moffat, 73 Mich. 188, 41 N. W. 224; Hazell v. Clark, 89 Mo. App. 78; Hunter v. Conrad, 18 Mont. 177, 44 Pac. 523; Pillsbury v. Pillsbury, 20 N. H. 90; Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Osbrey v. Reimer, 51 N. Y. 630; Central City Sav. Bank v. Walker, 66 N. Y. 431; Willis v. Crawford, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; Walker v. Tupper, 152 Pa. 1, 25 Atl. 172; Krall v. Forney, 182 Pa. 6, 37 Atl. 846; Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Earle v. Art Library Pub. Co., 95 Fed. 544; Shea v. Nilima, 133 Fed. 209, 66 C. C. A. 203; Fechteler v. Palm, 133 Fed. 462, 66 C. C. A. 336.

Previous to the decision of Cox v. Hickman, 8 H. L. Cas. 268, the leading case on the subject, which announced the rule that the parties to an alleged partnership are not liable as partners to third persons unless they are in fact partners as between themselves or have held themselves out as partners, it was frequently held by the American courts that as to third persons it was immaterial whether the alleged partners really intended to sustain the partnership relation toward each other if they shared the profits: Marine Bank v. Ogden, 29 Ill. 248; Brigham v. Clark, 100 Mass. 430; Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556; Lea v. Guice, 13 Smedes & M. 656; Bromley v. Elliott, 38 N. H. 287, 75 Am. Dec. 182; Van Kuren v. Trenton Locomotive etc. Co., 13 N. J. Eq. 302; Manhattan Brass etc. Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244.

But the weight of the more modern authorities in the United States is to the effect that the existence of a partnership relation depends upon the intent of the parties to sustain the relation of

partners toward each other with respect to a community of interest in both the property and profits of the common business or venture of the several parties, except, of course, in the case of a holding out of a person as a partner, which is really a case of estoppel: *Tayloe v. Bush*, 75 Ala. 432; *Wheeler v. Farmer*, 38 Cal. 203; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 528; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *National Surety Co. v. T. B. Townsend etc. Co.*, 176 Ill. 156, 52 N. E. 938; *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44; *Watson v. Lovelace*, 49 Iowa, 558; *Baughman v. Portman (Ky.)*, 14 S. W. 342; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Dutcher v. Buck*, 96 Mich. 160, 55 S. W. 676, 20 L. R. A. 776; *Bidwell v. Madison*, 10 Minn. 13; *Harris v. Threefoot (Wis.)*, 12 South. 335; *Bissell v. Warde*, 129 Mo. 439, 31 S. W. 920; *Mackie v. Mott*, 146 Mo. 230, 47 S. W. 897; *Horton v. New Pass Gold etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295; *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Klosterman v. Hayes*, 17 Or. 325, 20 Pac. 426; *Waverly Nat. Bank v. Hall*, 150 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Whitworth v. Patterson*, 6 Lea, 119; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043; *Smith v. Hollister*, 32 Vt. 695; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Z. C. Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265, *Setzer v. Beale*, 19 W. Va. 274; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577, 32 N. W. 768.

The intent, however, the existence of which is deemed essential, is an intent to do those things which constitute a partnership. Hence, if such an intent exists, the parties will be partners notwithstanding that they intended to avoid the liability attaching to partners or even expressly stipulated in their agreement that they were not to become partners. It is the substance, and not the name, of the arrangement or contract between them which determines their legal relation toward each other: *Bestor v. Barker*, 106 Ala. 250, 17 South. 389; *Chapman v. Hughes*, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588; *Parker v. Canfield*, 37 Conn. 250, 9 Am. Rep. 317; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Pursley v. Ramsey*, 31 Ga. 403; *Fouguier v. Chicago First Nat. Bank*, 141 Ill. 124, 30 N. E. 442; *Griffen v. Cooper*, 50 Ill. App. 257; *Hart v. Hiatt*, 2 Ind. Ter. 245, 48 S. W. 1038; *Cooley v. Broad*, 29 La. Ann. 345, 29 Am. Rep. 732; *Halleday v. Bridewell*, 36 La. Adv. 238; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Gunnison v. Langley*, 3 Allen, 337; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; *Vaiden v. Hawkins (Miss.)*, 6 South. 227;

Mulhall v. Cheatham, 1 Mo. App. 476; Van Kuren v. Trenton Locomotive etc. Mfg. Co., 13 N. J. Eq. 302; Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Mumford v. Nicoll, 20 Johns. 611; Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 744; Manhattan Brass etc. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Klosterman v. Hayes, 17 Or. 325, 20 Pac. 426; Righter v. Farrell, 134 Pa. 482, 19 Atl. 687, 19 Atl. 687; Boston etc. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Burnley v. Rice, 18 Tex. 481; Duryea v. Whitcomb, 31 Vt. 395; Rosenfield v. Haight, 53 Wis. 260, 40 Am. Rep. 770, 10 N. W. 378.

But, on the other hand, if the terms of the contract existing between the parties do not constitute a partnership, none will be declared, even though the parties have intended one, or even called the arrangement one: *Oliver v. Gray*, 4 Ark. 425; *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509; *Dwinel v. Stone*, 30 Me. 384; *Rose v. Buscher*, 80 Md. 225, 30 Atl. 637; *Ryder v. Wilcox*, 103 Mass. 24; *McDonald v. Matney*, 82 Mo. 358; *Van Kuren v. Trenton Locomotive etc. Co.*, 13 N. J. Eq. 302; *Burnett v. Snyder*, 76 N. Y. 344. In construing a contract which is claimed to constitute a partnership agreement, every doubt must be resolved in favor of the intent of the parties: *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785. In other words, the question whether a contract is one of partnership or not is determined by the same rules applicable to other contracts. The intention of the parties, when it is ascertainable, will have a controlling force when it is consistent with the language of the contract, even though the language be doubtful: *Hendricks v. Gunn*, 35 Ga. 234; *Horton v. New Pass. etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Atkins v. Hunt*, 14 N. H. 205; *Osbrey v. Reimer*, 49 Barb. 265. The court in *Fairly v. Nash*, 70 Miss. 193, 12 South. 149, saying: "But the question is one of intention, and a contract of partnership will no more be created by the courts against the will of a party than will those of any other character. One may not make a contract of partnership, and, calling it an agency, have it treated as such by the courts for when the facts are known the law fixes the legal consequences which flow from them. Neither may one secure the benefits of the relation of a partner, and by contract secure immunity from its liabilities as against creditors. But when the contract is susceptible of the construction put upon it by the parties at the time it was made, such construction will be accepted by the courts as the true one."

IX. Necessity for a Mutual Agency to Exist Among the Parties.

In the leading case on the subject of what constitutes a partnership (*Cox v. Hickman*, 8 H. L. Cas. 268), Lord Cranworth, in delivering his opinion, observed: "The liability of one partner for

the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are, therefore, liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade. This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are, by secret or private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business."

And Lord Wensleydale, in delivering his opinion in this same case, very pertinently observed: "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership. He says: 'Every partner is an agent of the partnership, and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent; a partner virtually embraces the character of both a principal and agent.'"

But in the later case of *Pooley v. Driver*, 5 Ch. Div. 458, which is also one of the leading cases upon the subject, the master of the rolls in adverting to *Cox v. Hickman*, 8 H. L. Cas. 268, said: "Then Lord Cranworth goes on to speak of agency, and I am almost sorry that the word 'agency' has been introduced into this judgment, because of course everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land as it is now. But when you get that idea clearly, you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others so as to bind the others, he acts on behalf of the firm of

which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others, he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity. That being so, you do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating in other words that he must be a partner, inasmuch as every partnership involves this kind of agency; or, if you state that he is agent for the others, you state that he is a partner."

In *Morgan v. Farrel*, 58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. 614, the court, Mr. Chief Justice Andrews delivering the opinion, said: "An exhaustive definition of partnership is not easy. So far as the facts in the case present the question of partnership, it is sufficiently accurate to say that there is a partnership between two or more persons whenever such a relation exists between them that each is as to all the others, in respect to some business, both principal and agent. If such a relation exists, they are partners, otherwise not. They are partners in that business in respect to which there is this relation; and as to any other business, they are not partners. Partnership is but a name for this reciprocal relation: Story on Partnership, sec. 1; Lord Wensleydale in *Cox v. Hickman*, 8 H. L. Cas. 268; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Holme v. Hammond*, L. R. 7 Ex. 218; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Collyer on Partnership*, secs. 139, 412; *Stillman v. Harvey*, 47 Conn. 26."

Likewise, in the principal case, it was held that parties interested in a joint venture are not partners unless one of them has clothed the others with an agency to act in his behalf in their business: *Brotherton v. Gilchrist*, 144 Mich. 274, ante, p. 397, 107 N. W. 890.

The element of agency of one alleged partner for the others in and about the business in question is sometimes regarded as the most conclusive evidence of the existence of a partnership: *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370. This idea has, however, been repudiated by the United States supreme court, the court observing: "Such a test seems to give a synonym rather than a definition; another name for the conclusion rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner who stands in the relation of principal to those by whom the business is actually carried on,

adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent": *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36 L. ed. 835.

Still the force of mutual agency as a test of the parties bearing toward each the relation of partners has been recognized in many cases: *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Lee v. Cravens*, 9 Colo. App. 272, 48 Pac. 159; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Hallet v. Desbau*, 14 La. Ann. 535; *Dutcher v. Buck*, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588; *Gibson v. Smith*, 31 Neb. 354, 47 N. W. 1052; *Eastman v. Clark*, 53 N. H. 276; *Halenback v. Rogers*, 57 N. J. Eq. 199, 40 Atl. 576; *National Union Bank v. Landon*, 66 Barb. 189; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Hart v. Kelley*, 83 Pa. 286; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835.

We believe that the views expressed by Mr. Justice Day in *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387, on this subject are correct. He observed: "Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other as being principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged.

"But if the relation of principal and agent be regarded as the true test of a partnership and consequent joint liability, the question still remains, What shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question?

"To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor: *Parsons on Partnership*, 71, and note; *Collier on Partnership*, secs. 25, 44. See, also, *Story on Partnership*, secs. 36, 38, 60; *Berthold v. Goldsmith*, 24 How. 536, 17 L. ed. 762.

"But this test is valuable as a rule chiefly because it evinces a relation between the parties where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting in the particular transaction as the agent or on behalf of the party sought to be

charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority or on behalf of each of the parties so related."

X. Status of de Facto Corporations as Partnerships.

The subject of what constitutes a de facto corporation was treated in the monographic note attached to *People v. Montecito Water Co.*, 33 Am. St. Rep. 176. The general rule is that where several persons who are doing business as a corporation are a de facto corporation, they cannot be held liable as members of a copartnership, but where they have assumed to act as corporation under such circumstances that they do not constitute either a corporation de facto or de jure, they may be held liable personally, and, as a general rule, be regarded as partners: Monographic note to *Cannon v. Brush Electric Co.*, 94 Am. St. Rep. 594, 595; monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 176; note to *Rutherford v. Hill*, 29 Am. St. Rep. 600.

XI. Status of the Promoters or Subscribers to the Stock of a Corporation Prior to Its Incorporation.

Though the decisions with respect to the question whether the promoters of a corporation are partners prior to the incorporation of the company are not apparently harmonious, a close examination of such decisions will show that the mere fact that persons associate themselves to promote or organize a corporation does not make such persons partners. It is true that they may, by reason of an express or implied agency on the part of all toward each, authorize transactions for which they will be liable as partners. But ordinarily, the promoters of a corporation are not partners for the reason that there is no agreement to enter into such a relation, and for the further reason that there is no agreement among them to share the profits, the agreement in that respect being that the corporation to be organized is to become entitled to the profits: *Hershey v. Tully*, 8 Colo. App. 110, 44 Pac. 854; *Arnold v. Conklin*, 96 Ill. App. 373; *McLennan v. Hopkins*, 2 Kan. App. 260, 41 Pac. 1061; *McLennan v. Anspaugh*, 2 Kan. App. 269, 41 Pac. 1063; *Sproot v. Porter*, 9 Mass. 300; *Dole v. Wooldredge*, 135 Mass. 140; *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826; *West Point Foundry Assn. v. Brown*, 3 Edw. Ch. 284; *Mosier v. Parry*, 60 Ohio St. 388, 54 N. E. 364; *McFall v. McKeesport & Y. Ice Co.*, 123 Pa. 259, 16 Atl. 478. In the recent case of *Mt. Carmel Tel. Co. v. Mt. Carmel etc. Tel. Co. (Ky.)*, 84 S. W. 515, it was held that subscribers to the stock of a proposed corporation were partners in the proposed business before the incorporation.

The holding of the court in *Hudson v. Spaulding*, 6 N. Y. Supp. 877, was to a contrary effect.

XII. Status of Parties Pretending to Conduct a Corporation.

"Parties assuming to act in a corporate capacity without legal organization as a corporate body are liable as partners to those with whom they contract": *Fuller v. Rowe*, 57 N. Y. 23; *Worthington v. Griesser*, 77 App. Div. 203, 79 N. Y. Supp. 52. And where there never were any real subscriptions to the capital stock or any payments thereon, or any intention on the part of the alleged incorporators to do so, all of which were required by the statute, it will be held that the corporation, so called, was but a name under which the parties conducted a commercial business: *Provident B. & T. Co. v. Saxon*, 116 La. 408, 40 South. 778. And, likewise, where the members of a corporation voluntarily change or alter the corporate name selected, without recourse to such formal proceedings as are prescribed by law, they will be regarded as having abandoned the old corporation, and will be held liable as partners in the new concern as to parties who deal with them or give them credit: *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 49 Am. St. Rep. 300, 26 S. W. 538.

XIII. Community of Interest in Property or in the Profits from the Management of Property or from Some Enterprise, as Constituting the Parties a Partnership.

a. Necessity for Community of Interest in the Property of the Alleged Partnership.

1. **In General.**—In order for a person to be a partner in an enterprise or business, it must appear that he has a right of control in connection with his alleged partners over the property of the partnership in addition to a share in the profits: *Autrey v. Frieze*, 59 Ala. 587; *Bond v. May* (Ind. App.), 78 N. E. 260; *Dwinel v. Stone*, 30 Me. 384; *Braley v. Goddard*, 49 Me. 115; *Winslow v. Young*, 94 Me. 145, 47 Atl. 149; *Beatty v. Clarkson*, 110 Mo. App. 1, 83 S. W. 1033; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *McCabe v. Sinclair*, 66 N. J. Eq. 24, 58 Atl. 412; *Wormser v. Lindauer*, 9 N. Mex. 23, 49 Pac. 896; *Ludowieg v. Talcott*, 47 Misc. Rep. 77, 93 N. Y. Supp. 621; *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429; *Clark v. Smith*, 52 Vt. 529; *Buckingham v. First Nat. Bank*, 131 Fed. 192, 65 C. C. A. 498.

The view that one must have a right to control the business in order to be a partner was stated with great clearness by Presiding Judge Corson in *Grigsby v. Day*, 9 S. Dak. 585, 70 N. W. 881. He said: "A participation of one in the profits of the business without having an interest in or right to control the business does not make him a partner. Something more is essential. He must have an interest in the business with a right to control, and thus have the

right to profits as a result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely: *Conklin v. Barton*, 43 Barb. 435; *Dutcher v. Buck*, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785. In the latter case the supreme court of Michigan, speaking by Mr. Justice Cooley, says: 'Except when one allows the public or individual dealers to be deceived by the appearance of a partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of a partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business. The plaintiff and defendant were not mutually principals or agents of each other. The plaintiff could make no contract for the purchase or sale of any land that would bind the defendant. He could look up farm lands that were for sale, and recommend their purchase to the defendant, but the defendant might or might not conclude to purchase; the same with regard to the sales. The title was in the defendant, and he could dispose of the lands purchased as he might think proper. The conclusion seems to be irresistible that the plaintiff was in no true sense of that term a partner, but was merely an agent of defendant, with very limited powers; and his share in the profits of the sales, if there were any, was merely as compensation for purchasing the lands for the defendant, and in looking after and paying taxes, renting them, etc. Having no interest in or control over the lands or money with which they were purchased, and no authority to bind the defendant in any matter pertaining thereto, he was not a partner as between themselves.'

In other words, participation in the profits and losses of a business does not constitute a partnership, but there must be such community of interest as enables each party to make contracts, manage the business, and dispose of the whole property: *Broadley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44. This idea of community of interest in the business really means that each partner must be a principal in the business conducted by the partnership: *H. B. Claffin Co. v. Gross*, 112 Fed. 386, 50 C. C. A. 300.

Thus an agreement for each person to furnish one-half of the money necessary to buy certain bonds, collect the bonds and be partners in respect to the venture was held to constitute a partnership regardless of the fact that one of the parties failed to furnish his share of the money, where it was shown that the other party allowed

him to assist in the collection of the bonds and the proceeds were deposited to the joint credit of both of the parties: *Leonard v. Boyd* (Ky.), 71 S. W. 508. Likewise, an agreement between three persons to carry out a contract for public work, under which agreement two of the parties agreed to furnish the money necessary to complete the work, and the profits were to be divided among the three, amounts to a partnership: *Miller v. O'Boyle*, 89 Fed. 140. And where several parties agreed that one of their number should take a contract to construct a light, one of them to furnish the iron work and the other the concrete and other portions, but the profits or losses to be equally divided, it was held a partnership: *United States v. Guerber*, 124 Fed. 823. And where a person who had a contract to grade a portion of a railroad made a contract with another by which that person was to furnish a certain number of mules as against a less number furnished by the first party, who in addition was to furnish his own services, the net profits of the business to be divided between the parties, it constituted a partnership as to third persons, even though the parties had agreed that one of the parties was not to be responsible for the debts that might be contracted: *Brandon v. Conner*, 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260. But a partnership is not created between several creditors of a contractor by a written agreement looking to the carrying out of a contract for their benefit: *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625, 28 South. 755.

Where one party furnishes money to buy cattle and horses, the other party to care for them and their increase, all losses to be borne equally and the proceeds to be equally divided after repaying the money advanced by the one party, the arrangement constitutes a partnership: *Mudd v. Bates*, 73 Ill. App. 576; *Stratton v. O'Connor* (Tex. Civ. App.), 34 S. W. 158.

Where a number of persons sign an agreement to drill for gas, all to share the profits in proportion to the amounts subscribed by them, it has been held to constitute a partnership inter se: *Clark v. Rumsey*, 52 N. Y. Supp. 417. But an agreement on the part of the holder of options on land, by which he empowers another to accept the options and sell the lands and divide the profits with such party, constitutes no partnership: *Clark v. Emery*, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A., N. S., 503.

But the mere fact that several persons are joint owners of property which may produce profit does not constitute them partners: *Abernathy v. Smith*, 57 Ala. 359; *Oliver v. Gray*, 4 Ark. 425; *Harris v. Umsted*, 79 Ark. 499, 96 S. W. 146; *Iliff v. Brazill*, 27 Iowa, 131, 99 Am. Dec. 645; *Labit v. Francioni*, 25 La. Ann. 488; *Chapman v. Eames*, 67 Mo. 452; *Thurston v. Horton*, 16 Gray, 274; *Vaiden v. Hawkins* (Miss.), 6 South. 227; *Hedges v. Wear*, 28 Mo. App. 575; *March v. Newark etc. Mach. Co.*, 57 N. J. L. 36, 29 Atl. 481; *Holmes*

v. United Ins. Co., 2 Johns. Cas. 329; Peltier v. Sewall, 3 Wend. 269; Irvine v. Forbes, 11 Barb. 587; Hopkins v. Forsythe, 14 Pa. 34, 53 Am. Dec. 513; Taylor v. Fried, 161 Pa. 53, 28 Atl. 493.

Tenants in common engaged in the improvement or development of the common property are presumed, in the absence of proof of a contract of partnership, to hold the same relation to each during such improvement or development as before it began. They may, of course, form a partnership for developing the common property if they so agree. A mere agreement between cotenants to drill oil-wells on the common property, each to pay one-half of the expense of producing and pumping the oil, to run into pipe-lines serving the district and there credited one-half to each of them, does not constitute a partnership between them: Butler Sav. Bank v. Osborne, 159 Pa. 10, 39 Am. St. Rep. 665, 28 Atl. 163.

In Dunham v. Lovelock, 158 Pa. 197, 38 Am. St. Rep. 838, 27 Atl. 990, the court, in a similar case, said: "It is elementary law that a partnership is created only by a contract, express or implied. The burden of showing its existence is on him who alleges it, and this burden the court below rightly held had not been lifted by the plaintiff. To be sure there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well or wells, but this could be compelled between tenants in common by bill or by account render. There was division of the product, but this was in accordance with the rights of the cotenants. Each had a right to share in the product in proportion to his interest in the estate. It may be said that there was a resulting division of profits, since, if the product exceeded the cost of production, there was a profit to each part owner; but if so it was shown by the settlement of his individual accounts only, and grew out of the fact that he received from his share of the product more than it cost him to secure it.

"So it may be said there was a contribution of losses, since each tenant sustained a loss when the value of his share of the product fell below its cost to him, but this was the individual loss of each, with whom no one else had any concern, and to which no one was bound to contribute. There is, therefore, no circumstance relating to the business done upon, or the development of, the lease not fairly and naturally referable to the relations of the parties sustained to each other as tenants in common. There is no agreement shown that tenants in common might not properly make with each other for the development of the property in which each held a separate title, but an undivided possession. Between persons so situated a partnership does not result by implication of law. It must be created by an agreement."

Hence, the fact that a lease of certain lots and the buildings thereon was purchased by two brothers under an agreement to share the cost and all subsequent loss or profits is not sufficient to establish a partnership between them: *McPhillips v. Fitzgerald*, 76 App. Div. 15, 78 N. Y. Supp. 631, affirmed in 177 N. Y. 543, 69 N. E. 1126.

2. Effect Where One Party Furnishes Land or Personal Property and the Other Services or Skill.—It is often very difficult to ascertain whether the person furnishing only skill or services toward a business enterprise in which the other person furnishes the property with which to conduct the business, does so as a principal or as an employé. But where several persons enter into a trade arrangement, whereby they have a community of interest in the property used in the business and also in the profits arising therefrom, they are generally regarded as partners: *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Lockwood v. Doane*, 107 Ill. 235; *Ryder v. Wilcox*, 103 Mass. 24; *Southern Fertilizer Co. v. Reames*, 105 N. C. 283, 11 S. E. 467; *Jones v. McMichael*, 12 Rich. 176; *Cothran v. Marmaduke*, 60 Tex. 370; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355.

Thus, where one party advanced a certain portion of the cost of erecting a house upon lands held by the other under a lease, the lessee agreeing to assign a half interest in the lease of the first party, and the subsequent costs of the enterprise were to be shared equally as also were the rents, the court held that the parties were partners: *Laffan v. Naglee*, 9 Cal. 662, 70 Am. Dec. 678. But a mere agreement whereby one of the parties buys lands at his own expense and has control over them, while the other party merely negotiates sales of the lands under his direction, is no partnership even though they divide the proceeds above the cost price and expense of selling the lands: *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147.

Where a party agrees with the owners of a large business house to conduct a drug department, in which the latter is "to furnish the capital," the department to be charged interest thereon, and the former "to manage the purchases and sales," the department being charged with rent and the other expenses of conducting it, but the net profits or the losses to be divided among the parties in certain proportions, the parties are partners: *Leber v. Dietz*, 22 Misc. Rep. 524, 49 N. Y. Supp. 1002. An agreement between a landlord and his tenant, that the landlord was to receive a certain proportion of the proceeds of grain and hogs raised by the tenant does not make them partners, since the landlord has no interest in the grain or hogs but only in the proceeds: *Randall v. Ditch*, 123 Iowa, 532, 99 N. W. 190. An agreement whereby one of the parties was to furnish the capital while the other was to plant and raise oysters, sending them to the first party to be sold by him, the net profits

to be divided, amounts to a partnership: *Ruckman v. Decker*, 23 N. J. Eq. 283. But a mere arrangement that plaintiff was to cultivate defendant's farm, each to pay half the expenses and divide the profits, does not make them partners: *Donnell v. Harshe*, 67 Mo. 170. An agreement whereby one furnishes the money to buy cattle, another furnishes his services in buying and shipping, the profits and losses to be shared equally, has been held to constitute a partnership: *Atchison etc. Ry. Co. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58; *Lengle v. Smith*, 48 Mo. 276. An agreement between the owner of land and another by which the land owner furnished money to purchase cattle to be placed on the land, the cattle to be cared for by the latter, but the amount of money so furnished to be repaid with interest from the proceeds of the stock when sold, and the profits and losses to be equally divided, constitutes a partnership: *Bank of Overton v. Thompson*, 118 Fed. 798, 56 C. C. A. 554. Likewise, where two parties purchase pork on joint account in their joint names, but one of the parties is to furnish all money necessary in excess of advances obtainable on the pork but is to be repaid with interest for such advances, the balance to be divided among the parties, the transaction is a partnership *inter se*: *Miller v. Price*, 20 Wis. 117. Similar transactions respecting the purchase of corn and tobacco were held to constitute the parties to be partners: *Pierce v. Shippee*, 90 Ill. 371; *Clarke v. Ware*, 8 Ky. Law Rep. 438.

And where the owner of a hotel contributed the hotel with its furnishings, while the other party, who was to manage the business, was to pay for the water, ice, electric lights and minor repairs, the profits of the enterprise to be divided between the parties, it was held to be a partnership; *Mason v. Gibson*, 73 N. H. 190, 60 Atl. 96. But in a somewhat similar case it was held to constitute no partnership where the person who conducted the hotel was alone responsible for the losses: *May v. International L. & Trust Co.*, 92 Fed. 445, 34 C. C. A. 448. And where one party furnishes a mill and the other the employés to operate it, the profits to be divided, it constitutes a partnership, since the capital stock of the partnership consists of both the mill and the employés necessary to operate it: *Sankey v. Columbus Iron Works*, 44 Ga. 228; *Wood v. Beath*, 23 Wis. 254; *Willey v. Renner*, 8 N. Mex. 641, 45 Pac. 1132.

But an agreement that the owner should furnish "the mills, the wagons, the mules and the hands," while the other should give the business his personal attention and have one-half of the profits for his personal services, does not make the parties partners in the operation of the sawmill: *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680. Likewise, where one person owns and operates a sawmill at his own expense, and another person at his own expense furnishes the mill with logs to be converted into lumber, each of the parties to have one-half of the lumber, the parties are not partners: *Hodges v. Rogers*,

115 Ga. 951, 42 S. E. 251. Neither are the parties to be considered partners in a similar transaction in regard to timber which was converted into cross-ties, even though the profits from the sale of the cross-ties were to be divided, since the mill owner had no title to the cross-ties, although he may have had a common interest in the profits: *Padgett v. Ford*, 117 Ga. 508, 43 S. E. 1002. But an agreement between a timber broker and a timber inspector that the inspector should receive forty per cent of the profits arising from timber speculations and bear forty per cent of the losses is a contract of partnership: *Stafford v. Sibley*, 113 Ala. 447, 21 South. 459. Likewise where four parties agreed to engage in the purchase of timber lands or standing timber from time to time, one of the parties to furnish the necessary money, one to superintend any logging decided upon, another to keep the accounts and make the sales, and the other to investigate and report on desirable timber lands, the money advanced to be repaid with interest, and the profits or losses to be shared as each transaction was finished, the agreement constitutes a partnership: *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288. But where one furnishes timber to the owner of a sawmill under an agreement to give the sawmill owner either one-half of the lumber resulting therefrom or a stipulated price per hundred feet for such one-half, the transaction does not constitute a partnership: *Thornton v. George*, 108 Ga. 9, 33 S. E. 633.

3. Effect Where Owners of Separate Businesses Pool Their Property, Interests or Proceeds Ratably or Otherwise.—Mere running arrangements such as exist where companies owning connecting lines of railroads or other means of conducting the business of a carrier, give through bills of lading or passenger transportations and divide the proceeds in proportion to the freight earned by each or the amount of business conducted, or other familiar methods of division, do not constitute partnership agreements: *Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *Irvin v. Nashville etc. R. Co.*, 92 Ill. 103, 34 Am. Rep. 116; *Atchison etc. R. Co. v. Roach*, 35 Kan. 740, 57 Am. Rep. 199, 12 Pac. 93; *Darling v. Boston etc. R. Co.*, 11 Allen, 295; *Hartan v. Eastern R. Co.*, 114 Miss. 44; *Aigen v. Boston etc. R. Co.*, 132 Mass. 423; *Watkins v. Terre Haute etc. R. Co.*, 8 Mo. App. 570; *Pattison v. Blanchard*, 5 N. Y. 186; *Briggs v. Vanderbilt*, 19 Barb. 222; *Mohawk etc. R. Co. v. Niles*, 3 Hill, 162; *Nashville etc. R. Co. v. Sprayberry*, 9 Heisk. 852; *St. Louis Ins. Co. v. St. Louis etc. R. Co.*, 104 U. S. 146, 26 L. ed. 679. And where a refrigerator company makes no contracts for shipment, but merely furnishes refrigerated and iced cars to railroad companies upon their order, the mere fact that it sends a man to superintend the loading of such cars, where it has no joint manager and does not conduct its business by joint agents, does not make it and the railroad company partners: *American Re-*

frigerator Transit Co. v. Chandler (Tex. Civ. App.), 93 S. W. 243. Likewise where two boat owners agreed that if at the end of the season the earnings of one boat, after deducting expenses, exceeded that of the other, after deducting expenses they would divide the excess, but neither of the parties had any control in the management of the boat of the other, the arrangement does not constitute them partners: *Fay v. Davidson*, 13 Minn. 523. It would be otherwise, though, if they had agreed to divide the profits of the boats at the end of the season: *Connolly v. Davidson*, 15 Minn. 519, 2 Am. Rep. 154; *Fleming v. Fay*, 109 Fed. 952, 48 C. C. A. 748. The distinction is that where the earnings are put into a common fund, that the associated persons become partners. Thus where several owners of tugboats formed an association, selecting a manager who handled and managed all of the vessels, collected the earnings, paid all expenses and distributed the profits in proportion to the agreed value of the vessels operated, the arrangement constitutes a partnership.

And where a stage route was divided into sections, and the fares, less tolls, were to be divided in proportion to the length of each section, the persons who operated the stages running over each section of the route are partners notwithstanding that each operator provided his own stages, horses and drivers, because the fares constituted a common fund: *Champion v. Bostwick*, 18 Wend. 175, 31 Am. Dec. 376.

Where the persons who sent milk to a cheese factory, which was established by them, received in return, at their option, cheese or the proceeds of its sale, in proportion to the amount of milk furnished by each of them, they are not regarded as partners: *Hawley v. Keeler*, 62 Barb. 231; *Butterfield v. Lathrop*, 71 Pa. 225; *Sargent v. Downey*, 45 Wis. 498. But where seven persons agree to deliver milk at a factory owned by three of their number, jointly hire a cheese-maker, pay the owners of the factory for the use of the factory, pay all the expenses of conducting the business, and then divide the net proceeds of the cheese manufactured in proportion to the amount of milk furnished by the respective parties, the arrangement constitutes a partnership: *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022. And where cranberry growers organize an association for the sale of their berries, conduct the business through their association, and divide the profits in proportion to the amount of berries furnished by the various members, it is held to constitute a partnership: *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 807. But a contract between two cotton compressing companies, whereby they agree to divide the profits of their business under the following conditions, namely, after first allowing each company to enjoy without division all the benefits from the compressing of the first fifty thousand bales of cotton, and after that to deduct forty cents per bale for the expenses of labor and handling, is not a partnership *inter se*: *Mayrant*

v. Marston, 67 Ala. 453. The court in the case just cited observed: "The agreement out of which the present controversy grew does not constitute the two firms partners inter sese. Neither firm is to share in any expenses or losses incurred or sustained by the other. To constitute a partnership between themselves, parties must stipulate for a community of risks, as well as a partition of gains: *Smith's Exr. v. Garth*, 32 Ala. 368; *Meaher v. Cox*, 37 Ala. 201. Under the contract in this case, neither contracting party is bound to contribute anything to the expenses or losses of the other. Neither was bound to aid the other in the performance of any work their several patrons might intrust to them. They only agreed to divide equally the profits of their several establishments, after setting apart to each the profits of compressing an agreed number of bales of cotton, to cover the expense of the season's work, and forty cents a bale for all cotton each might compress above that agreed number, to cover expense of handling. So clearly did the parties contemplate keeping their business separate, that they inserted this clause in their agreement: 'The business of our respective firms to be conducted entirely separate in all respects.' Good faith, and the implications of this contract, required that each firm should exert itself for the promotion of the general interest—that neither should obstruct or embarrass the other in the conduct of its business; but neither was bound to render to the other any active assistance in the performance of any contract, or to supply any machinery for this purpose."

An agreement between two cattle buyers that in order "to avoid conflict and rivalry between them in the cattle trade in that neighborhood" they would divide the profits and losses in respect to all cattle bought in the same neighborhood and shipped by either, does not constitute a partnership: *Clifton v. Howard*, 89 Mo. 192, 18 Am. Rep. 97, 1 S. W. 26.

Perhaps one of the most interesting pooling agreements or associations for the maintenance of a uniform scale of prices and equal distribution of work in the business so associated, the status of which as a partnership was called in question, is to be found in *Potter v. Morris etc. Dredging Co.*, 59 N. J. Eq. 422, 46 Atl. 537. In that case a number of persons and companies engaged in dredging organized a voluntary association known as the Dredge Owners' Association of New York Harbor. The question in the case was whether the complainant was entitled to an accounting by reason of the death of one of the members and the bankruptcy of another. The essential facts are shown in the quotation from the case which we shall extract from the case. In discussing the question the court said: "Is the association a partnership? On April 20, 1894, a number of persons, firms and corporations engaged in the business of dredgers formed an association with the above name and adopted a constitution, by-laws and rules. Article 2 of the constitution specifies that 'its object

shall be to designate and maintain a uniform scale of prices for dredging in that [New York] harbor and vicinity, and to equitably distribute work.' With a view to this object, it is provided that the association shall elect annually a president, a vice-president, a treasurer and an adjuster, and that weekly meetings shall be held. The powers of the association are chiefly concentrated in the 'adjuster.' Rule 2 provides, in substance, that members must not bid on work, and must not make contracts without the express authority of this last-mentioned officer. If the case is urgent, they may, indeed, name a 'spot price,' not less than the existing schedule price fixed by the association, but they must at once report to the adjuster, who may award the work to another member. Rule 3 provides 'that each member shall be entitled to a certain percentage of the work done, which percentage is to be figured on the basis of day's work.' By rule 5 the adjuster is directed to equalize the account of members, and to balance the same in his books. The objects of the association are, therefore, threefold: First, to fix prices; second, to prevent genuine competition in bidding among the members; third, to assign to each member his proper share or proportions of the aggregate of the contracts which may be entered into severally by the members, without, however, compelling any member to do any work which he may not have contracted to do, or which he may not desire to do. The basis of the apportionment is 'day's work,' which means days actually worked by the machines of the several contractors, the capacity of the machines being, roughly speaking, gauged by their power. The scheme, as I understand it (and I speak only from the bill and the schedules attached thereto), is to allow the several contractors who are members to bid for such work as they please, and to take the profits of it; but with this limitation: The members must bid according to the rules of the association, and, if he is getting more than his fair share of all the work done, the adjuster may refuse his assent to the award of any particular contract to him, or may, if he has named a 'spot price,' award the work to another member. No attempt is made in the constitution, by-laws or rules to create a common plant or a central control of the work undertaken, or to authorize bids by the association as such. Each member retains his own plant, hires his own men to operate it, and, the contract having been awarded to him with the approval of the adjuster, takes the profits and bears losses which result from its execution. Neither the association nor any officer of it has, after the award, the least authority to interfere. If the job is a profitable one, the association derives no benefit from it; if a losing one, no loss. Such an arrangement does not appear to me to come within any definition of partnership to be found in the text-books or in the adjudged cases. A partnership, says Mr Justice Depue in *Wild v. Davenport*, 48 N. J. L. 130, 57 Am. Rep. 552, 7 Atl. 295, is usually defined to be 'a voluntary contract

between competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, upon the understanding that there shall be a communion of the profits thereof between them.' In the case at bar there is no attempt to unite either the property, labor, or skill of the several members, and there is absolutely no communion of profits. Community of capital may not be essential (*Pooley v. Driver*, 5 Ch. Div. 458), but community of interest in profits is: 1 *Lindley on Partnership*, 7. Here there is no such community. The business of the members is dredging and each member dredges on his own account, and takes to himself alone, as I have said, such profit as he derives from the contracts that he is permitted to make. The association itself has no plant, does no work, and makes no profits. Its sole province is to maintain prices and to designate the members to whom the work shall go. Members may be assessed for the expenses of the association. There is a vague provision for 'extra assessment' in article 3 of the constitution, and it is said in rule 5 that in equalizing the account of members the adjuster 'may either apportion any work to members in arrears, or charge those in excess such sum in money as he may determine to be due those in arrears.' What this last provision means it is difficult to say. The expression 'members in arrears' is averred to mean members who have done less than their proportionate amount of work. The appropriate relief to be afforded to them is to assign them more if they desire it. How any sum of money can be due those in arrears does not appear. No rule for ascertaining it is to be found. So far as the bill shows, its ascertainment is impossible except by the arbitrary fiat of the adjuster. Should the adjuster attempt to name a sum as 'due' (and no such attempt is alleged), it is plain that his determination would not be an apportionment of profits according to any rule of the association, but rather a penalty exacted by him because of his own default in not properly regulating the award of contracts among the members on the basis of day's work. I am, therefore, of opinion that the association is not a partnership, and that it cannot be wound up on that theory." In this general connection see, also, subdivision XIII, e.

4. **Status of Subpartners with Respect to the Main Partnership.**—The fact that one is a subpartner—that is, a person who has an agreement with a member of a partnership to share with such member his proportion of the partnership—does not make him a member of the partnership: *Morrison v. Dickey*, 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Reynolds v. Hicks*, 19 Ind. 113; *Boimare v. St. Geme*, 113 La. 898, 37 South. 869; *Fitch v. Harrington*, 13 Gray, 468, 74 Am. Dec. 641; *Reilly v. Reilly*, 14 Mo. App. 62; *Murray v. Bogert*, 14 Johns. 318, 7 Am. Dec. 466; *Burnett v. Snyder*, 81 N. Y. 550, 37 Am. Rep. 527; *Nirdlinger v. Bernheimer*, 133 N. Y. 45, 30 N. E. 561; *Newland v. Tate*, 3 Ired.

Eq. 226; Setzer v. Beale, 19 W. Va. 274; Riedeburg v. Schmidt, 71 Wis. 644, 38 N. W. 336.

b. **Necessity for Participation in Both Profits and Losses.**—The status of persons associated together in some business with respect to the profits or losses of that business, is an important question in determining whether they are partners or not. The rule with respect to the necessity for a person to have a community of interest in the profits of the business is differently stated by different courts. We believe that the importance of the rule respecting the necessity of a person to have a community of interest in the profits as a test of partnership is really founded upon the notion that such a community of interest is the highest form of evidence that the person so entitled is a principal in the business which produces the profits. The conflicting cases on the subject of what constitutes a community of interest in the profits do not indicate anything more than that it is always a difficult thing to prove whether one is a principal or agent in any transaction.

Perhaps the more generally approved statement of the rule in respect to the necessity of common ownership of the profits is that persons are partners where it is their intention to carry on a business and share the profits as common owners or joint proprietors of the business: *McCrary v. Slaughter*, 58 Ala. 230; *McGill v. Dowdle*, 33 Ark. 311; *Wheeler v. Farmer*, 38 Cal. 203; *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034; *Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804; *Ellison v. Stuart*, 2 Penne. 179, 43 Atl. 836; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Stubbs v. Fleming*, 92 Ga. 354, 17 S. E. 935; *State Nat. Bank v. Butler*, 149 Ill. 575, 36 N. E. 1000; *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44; *Price v. Alexander*, 2 G. Greene, 427, 52 Am. Dec. 526; *Heard v. Wilder*, 81 Iowa, 421, 46 N. W. 1075; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Tanner v. Hughes (Ky.)*, 50 S. W. 1099; *Woodward v. Cowing*, 41 Me. 9, 66 Am. Dec. 211; *Staples v. Sprague*, 75 Me. 458; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133; *Dutcher v. Buck*, 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776; *Bohrer v. Drake*, 33 Minn. 408, 23 N. W. 840; *Herbert v. Callahan*, 35 Mo. App. 498; *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; *Gates v. Johnson*, 56 Neb. 808, 77 N. W. 407; *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406; *Willey v. Renner*, 8 N. Mex. 641, 45 Pac. 1132; *McGovern v. Robertson*, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 799; *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467; *Braithwaite v. Aiken*, 1 N. Dak. 475, 48 N. W. 361; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Walker v. Tupper*, 152 Pa. 1, 25 Atl. 172; *Jones v. McMichael*, 12 Rich. 176; *Spencer v. Jones (Tex. Civ. App.)*, 47 S. W. 29; *Owen v. Oviatt*, 4

Utah, 95, 6 Pac. 527; *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670; *Commercial Bank v. Miller*, 96 Va. 357, 31 S. E. 812; *Chapline v. Conant*, 3 W. Va. 507, 100 Am. Dec. 766; *Lathrop v. Knapp*, 27 Wis. 214; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. Rep. 972, 36 L. ed. 835.

Or, stated in other words, where the right of a party to share the profits of a business is not based on his common ownership of such profits, but merely as a personal debt due from his associates in the business, such party is not a partner in the business: *Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749; *Vanderhurst v. De Witt*, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; *Mason v. Sieglitz*, 22 Colo. 320, 44 Pac. 588; *Allen v. Hudson*, 78 Ill. App. 376; *Hallet v. Desban*, 14 La. Ann. 529; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Marsh v. Mueller*, 96 Mich. 488, 56 N. W. 71; *Fay v. Davidson*, 13 Minn. 523; *Bruen v. Kansas City etc. Assn.*, 40 Mo. App. 425; *Mason v. Hackett*, 4 Nev. 420; *Robbins v. McKnight*, 5 N. J. Eq. 645, 45 Am. Dec. 406; *Wormser v. Lindauer*, 9 N. Mex. 23, 49 Pac. 896; *Walker v. Tupper*, 152 Pa. 1, 25 Atl. 172; *Stevens v. Gainesville Nat. Bank*, 62 Tex. 499; *Fish v. Thompson*, 68 Vt. 273, 35 Atl. 174; *Bowyer v. Anderson*, 2 Leigh, 550; *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252; *Cooper v. Tappan*, 9 Wis. 361.

A contract of partnership is, however, like any other contract. Consequently the powers conferred, duties enjoined and liabilities imposed must be deduced from its terms: *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147. Mr. Justice Lindley in *Walker v. Hirsch*, 27 Ch. Div. 460, in speaking on the subject, observed: "Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words; their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered."

This community of interest in the profits must, of course, be mutual. By this mutuality is meant that each party has a specific interest as principal, and this interest in the profits must be in the profits as profits, and not merely for a stipulated portion of the profits as compensation for services toward the enterprise: *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44. The exact proportion that each party is to have of the profits need not be shown: *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358. But in order for one to be a partner, he must have a property in or control over or specific lien on the undivided profits in preference to other creditors: *Clark v. Emery*, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A., N. S., 503.

Participation in the profits is not conclusive evidence of partnership, but it is evidence of a partnership, and, in the absence of contradictory evidence, will control: *Faely v. Nash*, 70 Miss. 193, 12 South. 149. "While it may be one of the tests, it may be con-

trolled by other considerations": *Beard v. Rowland*, 71 Kan. 873, 81 Pac. 188. But participation in the profits of a business raises a presumption of the existence of a partnership: *Tamblyn v. Scott*, 111 Mo. App. 46, 85 S. W. 918. What is a partnership is a question for the court, but whether one exists is a question of fact for the jury: *Jones v. Purnell* (Del.), 62 Atl. 149.

In the recent case of *Hartford Fire Ins. Co. v. McClain* (Ky.), 85 S. W. 699, the court said: "Partnership is a status dependent upon contract between two or more persons. Its distinguishing essential elements are the contract or agreement to become partners and the sharing of profits or losses proportionally. Its members may contribute money, property, or labor, or any of them; but, unless there is an express agreement to share profits (and impliedly, if not expressly, to bear losses) in a given proportion among the parties to the agreement, it is not a partnership, whatever other rights the parties have."

It is generally stated that one of the tests of a partnership is that there must be a community of interest in the losses of the business or enterprise in addition to a community of interest in the profits thereof: *Howze v. Patterson*, 53 Ala. 205, 25 Am. Rep. 607; *Goldsmith v. Eichold*, 94 Ala. 116, 33 Am. St. Rep. 97, 10 South. 80; *Lee v. Cravens*, 9 Colo. App. 272, 48 Pac. 159; *Jones v. Purnell* (Del.), 62 Atl. 149; *Wilcox v. Dodge*, 12 Ill. App. 517; *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44; *Aullman v. Fuller*, 53 Iowa, 60, 4 N. W. 809; *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663; *Jones v. Davies*, 60 Kan. 309, 72 Am. St. Rep. 354, 50 Pac. 484; *Sharpe v. McCreery* (Ky.), 47 S. W. 1075; *Smith v. Walker*, 51 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; *Bohrer v. Drake*, 33 Minn. 408, 23 N. W. 840; *Priest v. Chouteau*, 12 Mo. App. 252; *Belknap v. Wendell*, 21 N. H. 175; *Cornell v. Pedron*, 60 N. J. Eq. 251, 47 Atl. 56; *Vanderburgh v. Hull*, 20 Wend. 70; *Jones v. Call*, 93 N. C. 170; *Wheeler v. Lack*, 37 Or. 238, 61 Pac. 849; *Chapman v. Lipscomb*, 18 S. C. 222; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Brigham v. Dana*, 29 Vt. 1.

An agreement to share the losses may, however, be implied from the existence of a community of interest in the profits: *Hillman v. Boney*, 78 Ill. App. 412; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850; *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Gates v. Johnson*, 56 Neb. 808, 77 N. W. 407. The court in *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850, in discussing this subject set forth what is perhaps the prevailing rule on the subject. It said: "Of course, the mere sharing of profits will not be construed as establishing the partnership relation: *Ruddick v. Otis*, 33 Iowa, 402. But it is an important circumstance to be taken in consideration. The obligation to share losses is an essential element to its existence: *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663. But enterprises are

not usually undertaken with a view of loss, and the mere fact that provision therefor is not expressly made does not preclude the inference that each partner is to bear his portion of the burdens as well as reap his share of the benefits of the venture. 'An agreement to share profits, nothing being said about losses, amounts *prima facie* to an agreement to share losses also, for it is but fair that the chance of gain and of loss should be taken by the same persons, and it is natural to suppose that it was their intention, if they have said nothing to the contrary; and accordingly it has been held that, unless an intention to the contrary can be shown, persons engaged in any business or venture, and sharing the profits to be derived from it, are partners as regards the business or venture': 1 *Lindley on Partnership*, Ewell, 30. This principle was recognized in *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668, where the court, speaking through Rothrock, J., said:

"It is not necessary, in order to constitute a partnership, that there be an express agreement that each party shall bear a share of any losses, which may occur in the business. This may be inferred from other provisions of the contract, the nature of the business, and the relation of the parties to the business to be transacted.' In the decisions of this court denying the existence of a partnership because of there being no obligations to share the losses, the agreements have been such as to exclude any such inference. Thus in *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824, *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663, *Holbrook v. Oberne*, 56 Iowa, 324, 9 N. W. 291, *Krause v. Meyer*, 32 Iowa, 566, *McBride v. Ricketts*, 98 Iowa, 539, 67 N. W. 410, and *Reed v. Murphy*, 2 G. Greene, 574, the contracts were those of employment at a percentage of the profits or this with salary added. There was no community of interest save the contingent share of profits in payment of services rendered. *Ruddick v. Otis*, 33 Iowa, 402, involved merely an advance to a firm for the purchase of wool with a stipulation that one-third of the profits realized should be paid for its use. In *Williams v. Soutter*, 7 Iowa, 435, Drew advanced money to the firm of Soutter & Way to be used in the business for one year, on condition that it be then returned with thirty per cent interest, or, at his option, one-third of the profits after deducting expenses. In *Clark v. Barnes*, 72 Iowa, 563, 34 N. W. 419, Seig & Williams furnished Barnes & Co. money and stock to manufacture wagons, upon an agreement to repay, with one-half the profits. In the last two cases the nature of the contracts precluded the notion that the parties advancing money were to share the losses, and gave them no control or direct interest in the business. From these authorities may be deduced, as established in this state, the following principles: 1. That the agreement only to share profits will not constitute partnership, though evidence of existence of that relation; 2. The sharing of losses is essential in a partnership though

the undertaking to do so may be inferred from an agreement to divide profits, unless precluded by the terms thereof; 3. That payment for services, or for the use of money or property to be used in the business, may consist of a share of profits, without making of the loaner or employé a partner. The absence of any participation in or control of the business is generally mentioned as indicating that a party is not a partner, and, of course, the converse must follow. Indeed, it will be found in most of the cases where the relationship is declared to exist *inter se*, the party held has enjoyed a direct, rather than merely a contingent, interest in the enterprise. The use of the term 'partnership' is not essential, and the adoption of a firm name may be dispensed with. The facts of no two cases are exactly alike. The only crucial test seems to be the intention of the parties. If it appears to have been their purpose to enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses, while securing certainty of the advantages to be derived from the relation, must be disregarded."

And where the venture or business involves the loss of time and labor given to the project by both of the parties, and the loss of traveling and incidental expenses by one of the parties, which he was to offset against the ideas and data of the other party, it is held that the sharing of the contingent profits in contemplation amounts *prima facie* to an agreement to share losses: *Leeds v. Townsend*, 89 Ill. App. 646. Likewise a partnership results from an agreement to share the net profits: *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823; *Tunblyn v. Scott*, 111 Mo. App. 46, 85 S. W. 918.

If the theory that each partner is the agent of the other partners in the prosecution of the common business is correct, it would naturally follow that each would be liable for his proportion of the losses where the evidence shows that such an agency exists with respect to the common business notwithstanding that no express agreement was had in relation thereto.

The questions as to the effect of a party receiving a share of the gross receipts or a share of the profits as compensation for services, rent or interest in loans or advances, are really the probative effect of those circumstances to prove or disprove that the party has or has not an interest in the profits as a principal, and not merely as a personal claim against the proprietors of the business or enterprise.

c. Effect Where the Sharing of Losses is Limited as to Some of the Parties.—In the principal case it was held where two persons comprising a partnership enter into an agreement with a third person for participation in the business with the understanding that his liability was to be limited by his advances, and that two original partners should make no contracts binding him, there was no partnership relation between them as to third persons: *Brotherton v. Gil-*

christ, 144 Mich. 274, ante, p. 397, 107 N. W. 890. Likewise it has been held that an agreement to the effect that a party putting in a certain amount of money in the venture would, if it turned out successful, receive one-third of the profits, and, if unsuccessful, his share of the losses was to be measured by the amount put in, did not constitute the parties to be partners: *Gille Hardware etc. Co. v. McCleverty*, 89 Mo. App. 154; *Orvis v. Curtis*, 12 Misc. Rep. 434, 33 N. Y. Supp. 589.

But there is authority to the effect that as between themselves partners may agree that some of their number shall be guaranteed against loss: *Pollard v. Stanton*, 7 Ala. 761; *Robbins v. Laswell*, 27 Ill. 365; *Consolidated Bank v. State*, 5 La. Ann. 44; *Rowland v. Long*, 45 Md. 439; *Walden v. Sherburne*, 15 Johns. 409; *Geddes v. Wallace*, 2 Bligh, 270.

d. Effect Where a Party Shares Loss or Expenses Only.—An arrangement between several parties whereby one is excluded from participating in the profits of the enterprise but is to be charged with the losses, if any, is not regarded as a partnership: *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Bailey v. Clark*, 6 Pick. 372; *Lowry v. Brooks*, 2 McCord, 421. An agreement between persons having similar causes of action against a village, that each shall bear equally the costs of an action which has been commenced against the village as a test case, does not make the persons so contributing partners toward each other: *Carter v. Carter*, 28 Ill. App. 340.

e. Effect Where Parties Share the Gross Receipts of a Business.—Gross returns necessarily include net profits. Hence if the sharer in net profits takes from the creditors the fund upon which they rely for payment, so also does the sharer in gross returns: *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192. The important test in determining whether the sharer in the gross receipts is a partner or not is to ascertain whether he has a right to be heard in the control or disposition of the affairs of the business. Thus where one party owned a sawmill and the other agreed to furnish him logs free of cost except payment for cutting the stocks, and upon sale of the lumber the proceeds were to be divided after deduction of the expenses of hauling the lumber to the cars, freight and expenses of sale, it was held to constitute no partnership inter se: *Nelms v. McGraw*, 93 Ala. 245, 9 South. 719. And where a person works for one owning a mill for one-half of the gross earnings, he is no partner: *Ambler v. Bradley*, 6 Vt. 119. An agreement on the part of one to sail and manage a sloop to be used for freighting, bear all expenses connected therewith, and keep the vessel in repair, does not constitute him a partner with the owner, even though he was to pay him one-half of the gross receipts: *Tobias v. Blin*, 21 Vt. 514. Likewise pooling arrangements with respect to fares or freights earned by several carriers are not regarded as partnership: *Wiggins*

Ferry Co. v. Chicago etc. R. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; *Pattison v. Blanchard*, 5 N. Y. 186. But an agreement that each of two persons shall furnish a horse, one of the persons to do all the work, the other to pay all expenses, the two, however, to divide the earnings equally, constitutes a partnership: *Gilbank v. Stephenson*, 31 Wis. 592. In this general connection see, also, the following subdivision and XIII, a, 3.

f. **Effect Where Parties Share Crops, Cattle and Their Increase Instead of Money.**—As a general rule, persons who cultivate land for the owner or rent it on shares for a share of the crops raised are not partners with the owner of the land: *Courts v. Happle*, 49 Ala. 254; *Taylor v. Bush*, 75 Ala. 432; *Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223; *Holloway v. Brinkley*, 42 Ga. 226; *Blue v. Leathers*, 15 Ill. 31; *Front v. Hardin*, 56 Ind. 161, 26 Am. Rep. 18; *Rose v. Busher*, 80 Md. 225, 30 Atl. 637; *McLaurin v. McColl*, 3 Strob. 21; *State v. Saunders*, 52 S. C. 580, 30 S. E. 616; *Mann v. Taylor*, 5 Heisk. 267; *Albee v. Fairbanks*, 10 Vt. 314. In *Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792, the court in speaking on this subject said: "There are obvious reasons for holding that farm contracts or agricultural agreements, by which the owner of lands contracts with another that such lands shall be occupied and cultivated by the latter, each party furnishing a certain proportion of the seed, implements and stock, and that the products shall be divided at the end of a given term, or sold, and the proceeds divided, shall not be construed as creating a partnership between the parties. Such agreements are common in this country, are usually very informal in their character, often resting in parol as in the present case. In the absence of stipulations or evidence clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the inconveniences and dangers frequently incident to that relation. The parties to such agreements seldom contemplate more than a tenancy of the land, with provision for compensation to the landlord from the fidelity, labor, and skill of the tenant. There is no community of interest in the land, which is the principal thing in the agreement, and a division and several ownership of the crops and other products are usually provided for. While the custom of renting farm lands upon shares is general, the courts have seldom held that such agreements create partnerships between the owner of the land and the tenant. A large majority of the cases construe them as creating tenancies only: *Chase v. Barrett*, 4 Paige, 148; *Quackenbush v. Sawyer*, 54 Cal. 439; *Chapman v. Eames*, 67 Me. 452; *Warner v. Abbey*, 112 Mass. 355; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Alwood v. Ruckman*, 21 Ill. 200; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309. The agreement in question relates exclusively to the

dealings of the parties with each other, and not with third persons. It distinctly separates their rights in the use and occupation of the land and in the ownership of its products. Such products and livestock were to be divided in specie, except that, where a division of the livestock could not be agreed upon, it was to be sold, and the amount received therefor divided. No debts were to be contracted by either party for which the other would be liable. Under this agreement the authority of the appellee to make sales of the livestock was that of an agent, and not that of a partner. Upon a fair construction of the agreement, it is evident that the appellee was the tenant and agent of the decedent, and in no sense a partner."

But the joint cultivation of land under an agreement to divide the profits is regarded as a partnership: *Allen v. Davis*, 13 Ark. 28; *Urquhart v. Powell*, 54 Ga. 29; *Plummer v. Trost*, 81 Mo. 425; *Reynolds v. Pool*, 84 N. C. 37, 37 Am. Rep. 607; *Brown's Exr. v. Higginbotham*, 5 Leigh, 583, 27 Am. Dec. 618.

The cropping contract in *Cedarberg v. Guernsey*, 12 S. Dak. 77, 80 N. W. 159, was perhaps as comprehensive a contract as generally prevails in such arrangements. In that case the owner of a farm contracted with one Swan Person to cultivate his farm for five years. Person was to furnish at his own expense all help, tools, teams and farming machinery, and to pay one-half the taxes. The title and possession of all crops and all stock placed or produced on the farm, except the horses of Person, were to be and remain in the owner of the land until sold and the proceeds divided. All stock furnished by the owner was to be appraised, and on the termination of the contract he was to be allowed to select stock of an equal value, but the balance of the stock was to be sold and divided. The owner of the land was to have a lien on the crops and increase of the livestock for all advances made by him for feed, seed, etc., and all sales of produce had to be accounted for and sold only under the direction of the owner of the land. The contract could be terminated by thirty days' notice prior to the 1st of October of any year. The court, in holding the contract not one of partnership, said: "It is true that the term 'division of profits' is used in one or two instances in the contract, but the term seems to be there used in the sense of division of proceeds after certain deductions are made. In the case at bar, Guernsey [the owner of the land] and Person were not agents of each other. Guernsey had no right, under the contract, to employ laborers on the farm. Neither could Person employ laborers upon the farm at the expense of Guernsey, as he had contracted to furnish all necessary labor at his own expense. Person had no right, as we have seen, to dispose of the products of the farm, except under the direction of Guernsey. Guernsey had a special lien upon all the interests of Person in the farm for

any advances he might make for feed, seed, etc. In short, the contract was a purely cropping one and not a partnership contract: *Bowers v. Graves & Vinton Co.*, 8 S. Dak. 385, 66 N. W. 931. All cropping contracts have, to a certain extent, the elements of division of profits, but such contracts are rarely held to be partnership contracts. They lack two of the essential elements of a partnership, namely, that the parties are mutually principals of and agents for each other, and that the business is carried on on joint account: *Grigsby v. Day*, 9 S. Dak. 585, 70 N. W. 881. The intention, also, of the parties must, to a great extent, control in determining whether their contract is one of partnership or not. It is quite clear in this case that it was not the intent of either of the parties to enter into a partnership contract. Certainly Guernsey, the owner of the land, and a nonresident of this state, could not have intended to enter into a partnership with Person under which he would be bound for all contracts entered into by Person relative to the farm. The respondent contends—and this was evidently the theory of the learned county court—that, under the contract in this case, Guernsey and Person were to conduct their operations at their joint and equal expense, and the net proceeds should be divided between them; but such, in our view, was not the nature of the contract. As will have been noticed, Person was to furnish feed and seed for the first year at his own expense, and all the labor during the term of the contract. It is true that Guernsey was to advance the feed for the first year, but he did so only as a loan to Person, and Person agreed to repay the same out of his portion of the crop at the end of the first year. The appraisalment of the stock provided for was not for the purpose of making the stock partnership assets, but to enable Guernsey to withdraw stock of the same value at the end of the term or when the contract should be terminated."

And where persons agree with the owner of cattle to herd his cattle for a certain period, and then return the original number and divide the increase, or pay an agreed valuation upon the original number in the herd and divide the excess in valuation, the arrangement is not a partnership: *Robinson v. Haas*, 40 Cal. 474; *Concannon v. Rose*, 9 Kan. App. 791, 59 Pac. 729; *Ashby v. Shaw*, 82 Mo. 76; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 296.

g. Effect Where Share of Profits is Allowed as Compensation for Services in Whole or in Part.—The mere fact that a person is to receive a share of the profits of a business or venture as compensation for his services in the business or enterprise does not make him a partner therein: *Moore v. Smith*, 19 Ala. 774; *Zuber v. Roberts* (Ala.), 40 South. 319; *Olmstead v. Hill*, 2 Ark. 346; *Gardenhire v. Smith*, 39 Ark. 280; *Dawson Nat. Bank v. Ward*, 120 Ga. 861, 48 S. E. 313; *Mayfield v. Turner*, 180 Ill. 332, 54 N. E. 418; *Smythe's*

Estate v. Evans, 209 Ill. 376, 70 N. E. 906; *Price v. Alexander*, 2 G. Greene, 427, 52 Am. Dec. 526; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850; *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875; *Cline v. Caldwell*, 4 La. 137; *McWilliams v. Elder*, 52 La. 995, 27 South. 352; *Holden v. French*, 68 Me. 241; *Sangston v. Hack*, 52 Md. 173; *Blanchard v. Coolidge*, 22 Pick. 151; *Harris v. Thriefoot (Miss.)*, 12 South. 335; *Aetna Ins. Co. v. Bank of Wilcox*, 48 Neb. 544, 67 N. W. 449; *Agnew v. Montgomery (Neb.)*, 99 N. W. 820; *Whitney v. Greta State Bank*, 50 Neb. 438, 69 N. W. 933; *Atherton v. Tilton*, 44 N. H. 452; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Lewis v. Greider*, 49 Barb. 606; *Grafel v. Hodges*, 112 N. Y. 419, 20 N. E. 542; *Smith v. Dunn*, 44 Misc. Rep. 238, 89 N. Y. Supp. 881; *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488; *Ryder v. Jacobs*, 182 Pa. 624, 38 Atl. 471; *Potter v. Moses*, 1 R. I. 430; *State v. Hunt*, 25 R. I. 69, 54 Atl. 737; *Mann v. Taylor*, 5 Heisk. 267; *Southworth v. Thompson*, 10 Heisk. 10; *Heidenheimer's Exrs. v. Walthew*, 2 Tex. Civ. 501, 21 S. W. 981; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6; *Morgan v. Stearns*, 41 Vt. 398; *Wilkinson v. Jett*, 7 Leigh, 115, 30 Am. Dec. 493; *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252; *La Flex v. Burs*, 77 Wis. 538, 46 N. W. 801; *Sohns v. Sloteman*, 85 Wis. 113, 55 N. W. 158; *Hambly v. Bancroft*, 83 Fed. 444; *Gentry v. Singleton*, 128 Fed. 679, 63 C. C. A. 231.

And, likewise, where a person receives compensation for his services partly in money and partly in a share of the profits, the fact of receiving a portion of his salary in profits does not make the party a partner: *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824; *St. Victor v. Danbert*, 9 La. 314, 29 Am. Dec. 447; *Stockman v. Michell*, 109 Mich. 348, 67 N. W. 336; *Morrow v. Murphy*, 120 Mich. 204, 79 N. W. 193, 80 N. W. 255; *Breman Sav. Bank v. Branch-Crookes Saw Co.*, 104 Mo. 425, 16 S. W. 209; *Glove v. Dawson*, 106 Mo. App. 107, 80 S. W. 55; *Nutting v. Colt*, 7 N. J. Eq. 539; *Cornell v. Redrow*, 60 N. J. Eq. 251, 47 Atl. 56; *Miller v. Bartlet*, 15 Serg. & R. 137.

The same rules are applicable even as against third persons, where there has been no holding out by the employé as a partner: *Hodges v. Dawes*, 6 Ala. 215; *Loomis v. Marshall*, 12 Conn. 69, 30 Am. Dec. 596; *Burton v. Goodspeed*, 69 Ill. 237; *Macy v. Combs*, 15 Ind. 469, 77 Am. Dec. 103; *Shepard v. Pratt*, 16 Kan. 209; *Chaffraix v. Lafitte*, 30 La. Ann. 631; *Bradley v. White*, 10 Met. 303, 43 Am. Dec. 435; *Hall v. Edson*, 40 Mich. 651; *Wiggins v. Graham*, 51 Mo. 17; *Voorhees v. Jones*, 29 N. J. L. 270; *Fitch v. Hall*, 25 Barb. 13; *Edwards v. Tracy*, 62 Pa. 374; *Polk v. Buchanan*, 5 Sneed, 721; *Goode v. McCartney*, 10 Tex. 193; *Bowman v. Bailey*, 10 Vt. 170.

It is, however, difficult to ascertain whether the interest of one obtaining a part of the profits in lieu of salary is in fact an em-

ployé, or whether the transaction is a device to evade the responsibility of a partner, and the decisions in such cases are quite numerous and conflicting. Each case must be decided with a view to the particular circumstances in the case.

h. Effect Where Share of Profits is Allowed in Repayment of Capital Advanced.—"Where one party contributes the capital and the other the labor, skill or experience for carrying on a joint enterprise, such a combination constitutes a partnership, unless something appears to indicate the absence of a joint ownership of the business and profits: 17 Am. & Eng. Ency. of Law, pp. 842, 843. Such absence of joint ownership is indicated when from the whole contract it appears that the party contributing his services is to receive a share of the profits merely as compensation for his services, as illustrated in some of the cases cited. But it does not appear from the fact that one part of the business is to be conducted by one of the parties and the other part by the other party, nor by the fact that the capital is to be returned to the partner putting it in before the profits are shared. These are but the ordinary incidents of a partnership": *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823.

1. Effect Where Share of Profits is Allowed as Interest on Loans or Advances.—The fact that one who loans money to a person in business or about to engage in business is to receive a share of the profits of the business as interest on his loan or advance does not make him a partner of the other transaction in a bona fide loan and not a mere device to avoid the liability of a partner: *Smith's Exr. v. Garth*, 32 Ala. 368; *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Haycock v. Williams*, 54 Ark. 384, 16 S. W. 3; *Evans v. De Lay*, 81 Cal. 103, 22 Pac. 408; *Cadenasso v. Antonelle*, 127 Cal. 382, 59 Pac. 765; *Butler v. Hinckley*, 17 Colo. 523, 30 Pac. 250; *Loomis v. Marshall*, 12 Conn. 79, 30 Am. Dec. 596; *Plunkett v. Dillon*, 4 Del. Ch. 198; *Ellison v. Stuart*, 2 Penne. 179, 43 Atl. 836; *Dubos v. Jones*, 34 Fla. 539, 16 South. 392; *Buckner v. Lee*, 8 Ga. 285; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Clark v. Barnes*, 72 Iowa, 563, 34 N. W. 419; *Johnson v. Carter*, 120 Iowa, 355, 94 N. W. 850; *Tate v. Crooks*, 64 Kan. 887, 68 Pac. 74; *Greend v. Kummel*, 41 La. Ann. 65, 5 South. 555; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Gallop v. Newman*, 7 Pick. 282; *Haskins v. Warren*, 115 Mass. 514; *Hazell v. Clark*, 89 Mo. App. 78; *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117; *Hunter v. Conrad*, 18 Mont. 177, 44 Pac. 523; *Waggoner v. Creighton etc. Bank*, 43 Neb. 84, 61 N. W. 112; *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Sheridan v. Medara*, 10 N. J. Eq. 477, 64 Am. Dec. 464; *Clayton v. Davett* (N. J. Eq.), 38 Atl. 308; *Jernee v. Simonson*, 58 N. J. Eq. 282, 43 Atl. 370; *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep.

267; *Wisotzkey v. Niagara Fire Ins. Co.*, 112 App. Div. 599, 98 N. Y. Supp. 760; *Waverly Nat. Bank v. Hall*, 150 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 427, 43 Am. Rep. 3; *Polk v. Buchanan*, 5 Sneed, 721. A contra rule, however, obtains in Texas; *Cothran v. Marmaduke*, 60 Tex. 370; *Dilley v. Abright*, 19 Tex. Civ. 487, 48 S. W. 548; *Fouke v. Brengle* (Tex. Civ. App.), 51 S. W. 519. In Pennsylvania there is a statute to the effect that such loans do not make the lender a partner: *Jordan v. Patrick*, 207 Pa. 245, 56 Atl. 538.

j. Effect Where Share of Profits is Allowed as Rent.—The mere fact that one receives a portion of the profits of a business as rent for premises used in the business does not make him a partner in the business: *McDonnell v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99; *Pulliam v. Schimpf*, 100 Ala. 362, 14 South. 488; *Romero v. Dalton*, 2 Ariz. 210, 11 Pac. 863; *Quackenbush v. Sawyer*, 54 Cal. 439; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 429; *Morgan v. Farrell*, 58 Conn. 413, 18 Am. St. Rep. 282, 20 Atl. 614; *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 16 South. 601, 27 L. R. A. 126; *Gurr v. Martin*, 73 Ga. 528; *Parker v. Fergus*, 43 Ill. 437; *Keiser v. State*, 58 Ind. 379; *Bradley v. Ely*, 24 Ind. App. 2, 79 Am. St. Rep. 251, 56 N. E. 44; *Reed v. Murphy*, 2 G. Greene, 574; *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875; *Bridges v. Sprague*, 57 Me. 543, 99 Am. Dec. 788; *Chapman v. Eames*, 67 Me. 452; *La Mont v. Fullum*, 133 Mass. 583; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; *Thayer v. Augustine*, 55 Mich. 187, 54 Am. Rep. 361, 20 N. W. 898; *A. N. Kellogg Newspaper Co. v. Farrell*, 88 Mo. 594; *Garrett v. Republican Pub. Co.*, 61 Neb. 541, 85 N. W. 537; *Austin v. Neill*, 62 N. J. L. 462, 41 Atl. 834; *Wormser v. Lindauer*, 9 N. Mex. 23, 49 Pac. 896; *Heimstreet v. Howland*, 5 Denio, 68; *Johnson v. Miller*, 16 Ohio, 431; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817; *Pierson v. Steinmyer*, 4 Rich. 309; *England v. England*, 60 Tenn. 108; *Tobias v. Blin*, 21 Yt. 544; *Robinson v. Allen*, 85 Va. 726, 8 S. E. 835; *Z. C. Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265.

XIV. Partnership by Estoppel.

In order that persons be liable as partners to third persons, it is not necessary that they be strictly partners inter se: *Dougherty v. Heckard*, 189 Ill. 239, 59 N. E. 569. One may estop himself from denying his liability as a partner where such a relation does not exist in fact by holding himself out as such or by negligently permitting another person to do so: *Jowers v. Phelps*, 33 Ark. 465; *Ellison v. Stuart*, 2 Penne. (Del.) 179, 43 Atl. 836; *Barnett Line of Steamers v. Blackman*, 53 Ga. 98; *Reynolds v. Radke*, 112 Ill. App. 575; *Strecker v. Conn*, 90 Ind. 469; *Sherrod v. Langdon*, 21 Iowa, 518; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026; *Green v. Taylor*, 98 Ky. 330, 56 Am. St. Rep. 375, 32 S. W. 945; *Grieff v. Boudous*.

quie, 18 La. Ann. 631, 89 Am. Dec. 698; Rice v. Barrett, 116 Mass. 312; Bissell v. Warde, 129 Mo. 439, 31 S. W. 928; Sargent v. Collins, 3 Nev. 260; Vibbard v. Roderick, 51 Barb. 616; Shafer v. Randolph, 99 Pa. 250; Grabenheimer v. Rindskoff, 64 Tex. 49; Cottrill v. Vanduzen, 22 Vt. 511.

LEAHY v. WAYNE CIRCUIT JUDGE.

[144 Mich. 304, 107 N. W. 1060.]

JUDGMENT BY DEFAULT, What is not.—A judgment entered after the defendant has answered, upon an issue of fact, though there is no appearance by him at the trial and no evidence offered on his part, is not a judgment by default. A judgment by default is one where the previous default of the defendant renders unnecessary any evidence on the part of the plaintiff. (p. 445.)

Mandamus to compel the court to vacate an order denying a motion to correct journal entry. The writ was denied, and the applicant appealed.

Nichols & Durfee and James G. McHenry, for the relators.

James Swan, for the respondent.

304 MONTGOMERY, J. The relators were defendants in an action of ejectment instituted in the Wayne circuit court. The plaintiff was Julia B. Warren. On the fifth day of February, 1905, the default of defendants in the action (relators) was entered. On the 25th of February, 1905, this default was, on motion of defendants, set aside on condition that a plea be entered forthwith, and the cause stand for trial at plaintiff's election. The case was thereupon assigned to Judge Rohnert's division for trial and regularly reached on said twenty-fifth day of February. A jury was impaneled, and testimony taken on behalf of the plaintiff. A verdict was rendered for the plaintiff. No one appeared before Judge Rohnert on defendants' behalf. Four days later judgment was entered on the verdict. The form of journal entry of the proceedings of the 25th of February ³⁰⁵ was that employed in ordinary trials, and shows that both parties were in court by their respective attorneys. On March 1, 1905, defendants entered a motion reading as follows: "Now come said defendants pursuant to the statute, and having paid the clerk of said

court all the costs and damages recovered by said plaintiff by the judgment rendered in said cause on the twenty-fifth day of February, A. D. 1905, make application for an order vacating said judgment and granting a new trial of said cause."

The motion was promptly granted. Another trial was had resulting in verdict and judgment for the plaintiff. Thereupon the defendants (relators) moved the court to correct the journal entry of February 25, 1905, so as to make the same show that defendants did not appear on the trial. This motion was denied, and the relators ask for mandamus directing the correction of the journal entry.

As the first judgment is no longer in force, it is obvious that it would be an idle proceeding to change its form unless the defendants' rights would appear to be greater if the fact of their nonappearance was shown. This was evidently the view of the circuit judge, and he was also of the opinion that the recital in the journal entry did no harm to defendants. It is not claimed by defendants that the judgment was not properly taken; that is to say, there is no showing that plaintiff proceeded irregularly; but the contention is that if the record were made to show that defendants did not appear the judgment would in legal effect be a judgment by default. It is further insisted that as a result of this the defendants would be entitled to treat the judgment entered on the trial of the case after the vacation of the judgment of March 1st as the first judgment in the case and subject to vacation on motion on terms under section 10,981 of 3 Compiled Laws. At least we gather that this is the ultimate end aimed at, although in relators' brief their position is stated as follows: ³⁰⁸ "The verdict rendered in said cause on February 25, 1905, and the judgment rendered thereon having been taken by default, relators are entitled to have the record therein corrected to correspond with the facts so as to enable them to make application to have said judgment set aside under the section of the statute providing for the vacating of default judgments": 3 Comp. Laws, sec. 10,982.

This section provides that a judgment in ejectment rendered by default shall be conclusive after three years; but that within five years after the rendering of such judgment on application of defendant, his heirs, executors, administrators or assigns, the court may vacate such judgment and

grant a new trial if such court is satisfied that justice will be thereby promoted and the rights of the parties more satisfactorily ascertained and established.

It is manifest that defendants did not, by their motion of March 1, 1905, proceed under this section, as no showing was made or attempted that justice would be promoted by a new trial of the cause. On the contrary, with full knowledge of the facts, defendants saw fit to apply for a new trial, assuming that they were entitled to it as a matter of right which they only were if section 10,981 controlled. Having elected to so treat this judgment, it would be an extraordinary proceeding to vacate the order vacating the judgment to enable defendants to attribute to the judgment a different character, and move to set it aside on a new and different showing, and this after the order vacating the judgment had been acted upon, and a new trial had. It is probably not deemed essential by defendants' counsel that a new order of vacation should be made. It is doubtless conceived that if the judgment of February 25th is made to take the form of a judgment by default, it would result that the motion for a new trial would be treated as made under section 10,982, and not under section 10,981. We do not think this would follow. The defendants have, by their action in making their motion and taking a new trial thereunder, elected as definitely as it were possible to do to treat this judgment as a judgment ³⁰⁷ on trial. We are of the opinion that in so treating this judgment they made no mistake. An issue of fact was joined between the parties, the case was regularly set and called for trial. We do not understand that a judgment by default, properly speaking, is entered in such circumstances. It is incumbent upon the plaintiff in such a case to make proof of his title. Such was the practice pursued in this case. Judgment was not pronounced upon defendants' default, but upon the case made by plaintiff's proofs. The term "default" has often been loosely used. In its strict sense, however, a judgment by default is rendered when the previous default of defendant has obviated the necessity of proof. A construction of section 10,982, which would admit of a defendant absenting himself from the trial and by so doing extend his time for moving for a new trial two years beyond the limit fixed by section 10,981, on the plea that a judgment in such case is a judgment by default, should not be adopted unless de-

manded by the language employed. We do not think it is required. In Anderson's Law Dictionary, title "Default," it is said: "When a defendant omits to plead within the time allowed for that purpose or fails to appear at the trial he 'makes default' and the judgment entered in the former case is a judgment by default." The same statement is found in Burrill.

It is true, as contended by relators' counsel, that a default may occur after appearance. The default may consist in failing to plead. But judgment by default cannot be taken after issue joined.

In *Strine v. Kaufman*, 12 Neb. 423, 11 N. W. 867, a statute which gave the right to a defendant to have a judgment rendered against him in his absence set aside on certain terms was construed. It was held, first, that absence meant the same thing as default, and, second, that a defendant who had appeared and answered was not in default within the meaning of the statute. It will be seen that the case goes much further than we do in holding that judgment by default ³⁰⁸ means a judgment on default for want of appearance or plea.

The supreme court of Kansas, in *Covart v. Haskins*, 39 Kan. 571, 18 Pac. 522, decline to accept the reasoning by which the Nebraska court reaches the conclusion that absence means the same thing as a failure to appear at any time, but also holds that default signifies that there has not been an appearance (answer) at any stage: See, also, *Page v. Sutton*, 29 Ark. 304; *Carlton's Admr. v. Ruffner*, 12 W. Va. 297. Cases which rest upon the peculiar phraseology of statutes differing essentially from ours cannot control. The relators have lost no substantial right by the action of the circuit judge.

The writ is denied.

Carpenter, C. J., and Ostrander, Hooker and Moore, JJ., concurred.

A Judgment by Default can be taken only when it appears that the defendant has been duly served with summons, and has failed to answer the complaint: *White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726.

FINCH v. HAYNES.

[144 Mich. 352, 107 N. W. 910.]

CONVEYANCE, Construction of.—A conveyance granting land to two parties and the survivor of them, and to their heirs and assigns, does not make the grantees joint tenants of the fee, but does make them joint tenants for life, with a remainder to the survivor in fee, and a conveyance by one of the grantees does not convert the estate into a tenancy in common, or have any effect against the other grantee after the death of the one executing the conveyance. (p. 449.)

Willis Baldwin and John J. Kiley, for the complainant.

Clark, Jones & Bryant, for the defendant.

³⁵² McALVAY, J. Complainant and Nellie Haynes, her sister, on July 6, 1899, acquired title to lot 62 in the village of Dundee, in Monroe county, from Joseph S. Dickerson and wife, the material provisions of which were as follows:

³⁵³ "This indenture, made the 6th day of July in the year of our Lord one thousand eight hundred and ninety-nine, between Joseph S. Dickerson and Ella T. Dickerson, his wife, both of the village of Dundee, county of Monroe, and State of Michigan, of the first part, and Nellie Haynes, of the same place, and Cora Finch, of the city of Lansing, Ingham county, and State of Michigan, and the survivor of them, of the second part,

"*Witnesseth*, That the said party of the first part, for and in consideration of the sum of one dollar, love, and affection and other considerations to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents, grant, bargain, sell, remise, release, and forever quitclaim unto said parties of the second part and the survivor of them, and to their heirs and assigns, forever, all that certain piece or parcel of land, situated in the village of Dundee in Monroe county, and State of Michigan, known and described as follows: . . .

"Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining. To have and to hold the same premises as above described to the parties of the second part and the survivor of them, and to their heirs and assigns, to the sole and only proper use, benefit, and behoof of the parties of the second part, and the survivor of them, and their heirs and assigns, forever."

On April 9, 1904, Nellie Haynes quitclaimed to defendant, her husband, all her right, title, and interest in said premises, described as an undivided one-half. She died May 16, 1905. During her lifetime defendant acted as agent of these two sisters in renting this property and collecting the rents for them. After the death of his wife, defendant placed his quitclaim deed on record May 22, 1905, and thereafter claimed to be a tenant in common with complainant in said premises, owning an undivided one-half thereof, and entitled to one-half of the rents.

Complainant filed her bill in the circuit court for Monroe county, in chancery, setting forth the above facts, claiming as survivor to be sole and absolute owner in fee ³⁵⁴ of said premises, and praying that she be decreed to be such owner, that the cloud of said deed upon her title be removed, and for an accounting with defendant for rents received by him. Defendant demurred to this bill of complaint for the following reasons: That by conveyance to complainant and Nellie Haynes, the latter received title to an undivided one-half of the premises and a lawful right to convey the same; that by the deed to him he took title to such undivided one-half interest, and was entitled to possession and rents and profits thereof. The demurrer was overruled and defendant's counsel having stated upon the argument that in such case they did not desire to answer the bill of complaint, a decree was entered for complainant granting the relief prayed.

Defendant asks this court to reverse this decree for the reasons set forth in the demurrer. The case must be determined upon the construction of the deed from Dickerson and wife to complainant and her sister. The intent of the grantor, as clearly expressed in the deed, was to convey a moiety to each of these parties for life, with remainder to the survivor in fee. This is expressed in the premises, in the granting clause, and in the habendum. By a conveyance of her interest, could either of the grantees in this deed create a tenancy in common, so as to cut off the contingent remainder? The case of *Midgley v. Walker*, 101 Mich. 583, 45 Am. St. Rep. 431, 60 N. W. 296, is urged as authority that this might be done. That was a case where the interest of one of two joint tenants under a deed, where the right of survivorship was expressly granted, was purchased under an execution sale upon judgment against him, and this court held that such interest was

subject to levy and sale. The decision goes no further than that. No greater estate can be alienated, either by the act of a party or by operation of law, than such party has in the real estate. In *Midgley v. Walker*, 101 Mich. 583, 45 Am. St. Rep. 431, 60 N. W. 296, this court quotes with approval 1 Washburn on Real Property, sixth edition, section 862: "No charge, therefore, like a rent, or a right of way, or a judgment, created by one cotenant, can bind the estate in ³⁵⁵ the hands of the survivor, unless the charge be created by the one who becomes such survivor, or the creator of the charge releases his estate to a cotenant, who, as releasee, accepts, with that part of the estate, the charge inhering therein by his own act."

In the case at bar neither grantee could convey her interest in the estate so as to cut off the remainder. The deed which we are construing conveys to the grantees, "to them and the survivor of them, and to their heirs and assigns forever." The use of the words "their heirs" does not obscure the plain intent of the grantor. The fact that the plural is often used where the singular was intended is recognized. If the deed under consideration had, as defendant contends, made the grantees therein named joint tenants of the fee, either of those grantees could, by conveyance in her lifetime, have deprived the other of the right of survivorship: 1 Washburn on Real Property, 6th ed., sec. 864; 17 Am. & Eng. Ency. of Law, 2d ed., 650. But that deed did not make the grantees joint tenants of the fee.

"Deeds and devises are often made to two or more, and to the survivor of them and his heirs, the effect of which is to make them joint tenants for life with a contingent remainder in fee to the one who survives": 1 Washburn on Real Property, 6th ed., sec. 866.

In such cases—and this is such a case—it is settled (see *Schulz v. Brohl*, 116 Mich. 603, 74 N. W. 1012; *Ewing's Heirs v. Savary*, 3 Bibb (Ky.), 235), that no joint tenant can, by his conveyance or otherwise, affect the right of survivorship.

The decree of the circuit court is affirmed, with costs.

Carpenter, C. J., and Blair, Ostrander and Moore, JJ., concurred.

To a Joint Tenancy it is essential that the tenants have one and the same estate, created by one and the same conveyance, of interests
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commencing at one and the same time, and held by one and the same undivided possession: *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253. See, also, *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Johnson v. Johnson*, 173 Mo. 91, 96 Am. St. Rep. 486.

PETROSKI v. MINZGOHR.

[144 Mich. 356, 108 N. W. 77.]

VENDOR AND PURCHASER, Trust Against the Latter in Favor of the Former.—If one in the possession of real property contracts to sell to another all the timber he may remove therefrom before a date specified, and he enters under such contract and commences cutting the timber, he stands in the position of a vendee of land, and cannot disavow the vendor's title nor acquire title in hostility thereto, and if he purchases a paramount outstanding title, he acquires it in trust for his vendor, and will be compelled to convey it on the payment of the amount expended in its acquisition. (p. 451.)

C. F. Button, for the complainant.

Joseph F. Hambitzer, for the appellant.

³⁵⁶ GRANT, J. In December, 1891, one Edward Phelps purchased from the United States the west half of the west half of section 15, town 51 north, range 34 west. He received a patent, but never recorded it. He immediately cut off and sold the valuable pine timber, abandoned the land, left the state, and went to Minnesota. He paid no taxes. A purchaser of the land at a tax sale wrote to Mr. Phelps, who replied that he did not want the land. Complainant purchased this tax title, and also another tax title, and paid the subsequent taxes. She, through her husband, entered upon the land, upon which there was a small house, and cut ties and timber therefrom. On April 14, 1902, she executed ³⁵⁷ to the defendant, under her hand and seal, a bill of sale of all the tamarack and cedar timber he might remove from said land before the first day of July following at one dollar and fifty cents per one thousand feet. He entered upon the land and commenced cutting the timber. He knew that complainant had and relied upon a tax title. He ascertained the residence of Mr. Phelps in Minnesota, went to see him, and procured from him a deed for the sum of fifty dollars. He also obtained from him an assignment of all rights to recover for

timber which had previously been cut by her from the land. He testified that he got the title for the purpose of protecting himself in cutting the timber under his contract with complainant. He subsequently obtained the advice of his attorney, repudiated his contract with complainant, notified other parties not to pay her for timber bought from her, and claimed title to the land. The bill of complaint is based upon the theory that the defendant is a trustee of complainant, and prays for an accounting of the timber cut by him, and that he be decreed to transfer all his rights in said land and timber to her. The case was heard upon pleading and proofs, and decree entered for the complainant, upon payment by her to him of one hundred and eighteen dollars and fifty cents, the amount of his expenses in procuring the deed from Phelps.

Complainant was in the possession of the land at the time she made the contract with defendant. He went into possession under her. He remained in possession under her until he had secretly acquired the original title. The bill of sale by complainant to him contained a covenant of warranty and an agreement to defend the sale made thereby. He had an irrevocable license for the term specified in the contract. She could not eject him in a suit at law, or restrain him from cutting and removing the timber by a ³⁵⁸ suit in equity. He had purchased standing timber and possession of the land. They stood in the position of vendor and vendee of land. He had recognized her title and was not in a position to disavow it or to obtain for his own benefit a title hostile to it. By his conduct he held the land in trust for her, and equity will compel him to transfer it to her: *Galloway v. Finley*, 12 Pet. (U. S.) 264, 9 L. ed. 1079; *Kirkpatrick v. Miller*, 50 Miss. 521; *Stephens v. Black*, 77 Pa. 138; *Peay v. Capps*, 27 Ark. 160; *Cromwell v. Craft*, 47 Miss. 44; *Mitchell v. Chisholm*, 57 Minn. 148, 58 N. W. 873. See, also, *Thredgill v. Pintard*, 12 How. (U. S.) 24, 13 L. ed. 877.

"The vendor and vendee [of land] stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title": *Galloway v. Finley*, 12 Pet. (U. S.) 264, 9 L. ed. 1079.

"After doing homage to his vendor's title by purchase and entry under it, the vendee will not be tolerated to repudiate his allegiance to it, and transfer it to another title acquired whilst thus in possession. If such after-acquired title should be paramount, the vendee shall be esteemed as holding it in

trust for his vendor, as having provided it to support and maintain his possession, and his right under his original vendor.

"Whilst a court of equity holds the vendee to entire good faith to his vendor, and will not allow him to get in an outstanding title or encumbrance, and set it up in opposition to his vendor, yet it will lend its aid to reimburse all reasonable advances expended to fortify the title. At the same time it will rebuke every attempt by the purchaser to betray or invalidate the title": *Kirkpatrick v. Miller*, 50 Miss. 521.

"A vendee under articles may set up an outstanding title not in himself, but when he buys such title, he is trustee of his vendor, and is entitled only to what he paid to perfect the title": *Stephens v. Black*, 77 Pa. 138.

"A vendee in possession under a contract of sale cannot retain possession and avoid payment of the balance of the purchase money on the ground that the vendor cannot make as good a title as agreed. Before he can avail himself of such defense he must offer to rescind the contract": *Peay v. Capps*, 27 Ark. 160.

"A vendee, continuing to hold the possession of land ³⁵⁹ to which his vendor admitted him, cannot acquire an adverse title and set it up against his vendor": *Cromwell v. Craft*, 47 Miss. 44.

"While a vendee remains in possession he is estopped from denying the plaintiff's title, whether it is good or bad": *Mitchell v. Chisholm*, 57 Minn. 148, 58 N. W. 873.

Decree is affirmed, with costs.

Blair, Montgomery, Ostrander and Hooker, JJ., concurred.

A Vendee Who Enters into Possession of Lands under an executory contract of sale cannot deny the vendor's title nor acquire a title in hostility thereto: *Fowler v. Cravens*, 3 J. J. Marsh. 428, 20 Am. Dec. 153; *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 605; *Seadbury v. Stewart*, 22 Ala. 207, 58 Am. Dec. 254; *Champlin v. Dotson*, 13 Smedes & M. 553, 53 Am. Dec. 102. For exceptions to this general rule, see *Smith v. Babcock*, 36 N. Y. 167, 93 Am. Dec. 498; *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458.

ALLEN v. THORNAPPLE ELECTRIC COMPANY.

[144 Mich. 370, 108 N. W. 89.]

WATERS—Riparian Rights.—An owner of land is entitled to have the water enter and leave his premises in the natural and ordinary way and at all times. This rule applies to high as well as to low water. (pp. 455, 456.)

WATERS—Dams Backing up on Lands of Riparian Proprietor in Times of Freshets.—A lower riparian proprietor has no right to maintain a dam which will back water upon the upper riparian proprietor's lands in time of freshets, or prevent its flowing therefrom to his injury, though at ordinary stages of water such dam will not occasion any injury. (pp. 456, 457.)

WATERS, Dams, Remedy for Maintenance of to the Injury of the Upper Proprietor.—If a dam has been maintained in a stream to the injury of an upper riparian proprietor in times of freshet, he is entitled to a judgment reducing the height of the dam so that it will not inflict such an injury and awarding him compensation for the damages previously suffered. (pp. 457, 458.)

Action against the defendant company. Decree for the complainants, and the defendant appealed.

Hartley E. Hendricks, Milton F. Jordon and Thomas Sullivan, for the complainants.

Colgrove & Potter, for the defendants.

371 HOOKER, J. The complainants are owners of sixty-seven acres of land, most of which is bounded on the east by the Thornapple river. The stream is tortuous, having banks upon complainants' premises approximating a mile long. It is shown that there is considerable bottom land adjacent to the river, in all about twenty-three acres. The defendant purchased a dam site at La Barge, six miles below the complainants' farm (where there had previously been a dam seven feet high), and some rights of flowage, which are said to permit the raising of the dam to eighteen feet from low-water mark at a point three hundred feet below the new dam. The defendant admits that it built a new dam fifteen and fifty-nine hundredths feet high above low-water mark at La Barge, so constructing it that by the use of slash boards, it could be raised to eighteen feet. It does not appear that it acquired any rights of flowage upon the complainants' land, and it is claimed on its behalf that before building its dam, it caused levels to be taken which, as reported by its surveyor, showed that a dam twenty feet high would "pond the water" as far

up as the Stauffer bridge, which was two miles down the stream below the north line of complainants' land. The bill was filed to restrain the maintenance of the dam, and incidentally to recover damages for injury to complainants' land.

There is no proof that the dam is higher than low-water mark at the north line of the complainants' land, but the ³⁷² bill alleges that, in times of freshet, the dam so obstructs the flow of the stream that the low lands are submerged and injured by water and ice. The learned circuit court judge who heard the cause found that this allegation was true, and rendered a decree accordingly, and the defendant appealed. The defendant contends that it has a right of flowage, which permits a dam twenty feet high, and that the complainants cannot complain so long as it does not raise the water at their premises at its ordinary stage. A map was put in evidence, by the defendant, which shows levels from the point called datum, three hundred feet below the dam, to various points upon the complainants' premises. From this we are able to determine that the lowest point of the land is seventeen and forty hundredths feet above datum, other measurements are eighteen and thirty hundredths, eighteen and fifty hundredths, eighteen and sixty hundredths, eighteen and seventy hundredths, and they run as high as twenty-three and thirty hundredths feet. There are two levels which show twenty-four and twenty hundredths and twenty-four and thirty hundredths, but the most of them are below twenty-one feet, and many below nineteen feet. It is complainants' claim that, when the freshets come, all of the water in the pond below the level of the dam is dead water, and an obstacle to the flow of water coming down from above, and that the consequence is a much greater rise at their premises than would occur if there was no impediment to the flow of water along the bed of the stream, and that as a consequence their land is not only overflowed but is saturated with water, which it would not otherwise be. The circuit judge has so found, and we are of the opinion that the proof warrants the finding.

The defendant admits that the dam proper is fifteen and fifty-nine hundredths feet high, and its manager stated that it was sixteen feet high. If by this is meant sixteen feet high above datum it is one thing, but if sixteen feet above the bed at the point where the dam is located, it may be quite another, for datum is necessarily some and perhaps considerably lower

than low water at the dam. It is admitted that, with the flashboards in place, it would pond the water back to the bridge, a distance below complainants' north line, at an ordinary stage of water, by which we understand is meant ordinarily low ³⁷³ water. The evidence on the part of the complainants tends to show some two or three feet more of water at the bridge or ford in times of ordinary low water, and when we consider the volume of the stream, which is naturally a rapid one, and which, under existing conditions, enters at the bridge, on a level of six miles, whereas in its natural state there was a fall of eighteen feet between that point and the dam site, it is self-evident that the velocity of the current must be lessened, and that the swifter current above must deliver the water more rapidly than it can be delivered at the dam, and the inevitable result must be a rise of the water above. How far up the stream such rise will be apparent must depend upon the distance necessary to increase the depth of the pond sufficient to establish an equilibrium between the volume of the stream above and the overflow at the dam. Whatever this rise is upon complainants' land, if any, in ordinary low water, it is an invasion of their rights, and could be recovered for if it has damaged them, if their bill had made claim for such damage.

But the cause for suit alleged is that they are damaged in times of freshets, their claim being that the ponding of the water affects their premises at all times, but especially when the stream is swollen, and that the defendant is at such times liable for the consequences of its ponding the water. To this the defendant replies that it is not responsible for the consequences of freshets, and its counsel cite the case of *Richards v. Peter*, 70 Mich. 286, 38 N. W. 278, to the proposition that it has the right to back the water to complainants' north line, and that so long as it does no more, there is no liability, whatever consequences may ensue. If a proper interpretation of the case of *Richards v. Peter*, 70 Mich. 286, 38 N. W. 378, warrants defendant's claim, it stands practically alone and unsupported. On principle we must say that the owner of land is entitled to have the water enter and leave his premises in the natural and ordinary way at all times, and this rule applies to ordinary low water and ordinary high water. Subject to this the owners, above ³⁷⁴ and below, may use the water for their own purposes. But the lower proprietor

may not raise the bed of the stream below to a level for six miles, where previously there was a fall of eighteen feet, either by filling with earth or a dead wall of water, thereby causing the accumulation of a head above to the injury of his neighbor, even if such effect is slight or imperceptible except in seasons of rain. He must act with reference to all ordinary stages of water and all seasons, and the exception relates only to those extraordinary and abnormal conditions and floods which, if known before, at least occur only on rare occasions. Such was the limitation placed upon a similar case in Pennsylvania, that of *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474, and the later case of *McCoy v. Danley*, 20 Pa. 85, 57 Am. Dec. 680. See, also, *Michigan Paper Co. v. Kalamazoo Valley Electric Co.*, 141 Mich. 48, 104 N. W. 387.

We must assume that it was such freshets that the court had in view in *Richards v. Peter*, 70 Mich. 286, 38 N. W. 278, and that it did not intend to hold that a lower proprietor was entitled to take away the opportunity for the discharge of water from an upper proprietor, so that every increase in the volume of the stream would necessarily flood, to a greater or less extent, the lands of his adjacent upstream neighbor: See *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613, note; *Barnard v. Shirley*, 151 Ind. 160, 47 N. E. 671, 41 L. R. A. 747, note; *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 51 Atl. 179, 59 L. R. A. 817, note. We do not discuss at length the many cases, cited in these notes, which sustain the rule that a dam owner will be liable if, in the ordinary times of high water, the overflow passes his neighbor's line: See *Dorman v. Ames*, 12 Minn. 451; *Ames v. Manufacturing Co.*, 27 Minn. 245, 6 N. W. 787. For late cases, consult 4 Current Law, p. 1826, and note.

The defendant's counsel call attention to certain evidence showing that, by extensive dredging and draining in adjoining counties, the volume of water in Thornapple river has been materially increased. How far we would be justified in taking judicial notice of the fact that much, ³⁷⁵ if not all, of this work was after the year 1903, when this suit was commenced, we need not determine. It is enough to say that it is not shown that it was not after that time that this increase began. We are convinced that the complainants' land has been injured by the defendant's dam. If, as the complain-

ants claim, the flashboards were in place at the time, we would think that their removal in times of high water would do much to lessen the damage, possibly it could prevent any. If, however, the flashboards were off, as the defendant's testimony tends to show, it is manifest that adequate wasteweirs, or gates, to relieve the flood were not provided. Before the decree was rendered, the dam went out. We construe the decree to mean that the court found that the complainants had sustained damages to the amount of one hundred and fifty dollars, and that if the defendant should elect to rebuild its dam to a less height, so that it would not thereafter affect the stream at complainant's premises, that sum, with costs, should be the limit of their recovery, but if defendant should elect to rebuild its dam to the former height, they should recover the sum of one thousand dollars, and that the defendant should thereafter have the right to flow such lands by such dam. The decree has not in terms provided for an injunction against the maintenance of the dam. It has, however, placed a condition upon its erection, viz., the payment of one thousand dollars to the complainants. This was doubtless upon the theory that complainants, having sought relief in equity, should do equity, and accept reasonable compensation for past and future damages, instead of requiring a disproportionate sacrifice by the defendant, through the crippling of its water power and business.

We are of the opinion, however, that the damages allowed are excessive. The evidence does not show that the land is rendered useless. It will have a material value for farming purposes much of the time, and we think six hundred and ninety dollars ample compensation for all past and prospective damage to said land from the dam in question. To us it seems obvious that the maintenance of the dam at fifteen and fifty-nine hundredths feet in ³⁷⁶ height has been and will continue injurious to the complainants, and that its effect has been to raise the water in times of freshet upon their land at least two feet. It is not improbable that it raised the water more than that. We are of the opinion, therefore, that the height of the dam should be reduced to fourteen feet above datum, hereinbefore referred to, and that complainants recover one hundred and fifty dollars damages, unless defendant shall pay, or tender to the complainants or their solicitor, the sum of six hundred and ninety dollars,

within ninety days after notice of this decree, which sum, if paid, shall be in full payment for the right to flow the said bottom lands of said complainants, heretofore and hereafter, by a dam of the height heretofore maintained by the defendant. The case of *Blake v. Cornwell*, 65 Mich. 467, 32 N. W. 803, warrants such a decree.

The decree will be modified in accordance with the opinion, the defendant to recover costs of this court.

Grant, Blair, Montgomery and Ostrander, JJ., concurred.

While a Person may Erect a Dam in a stream for certain useful purposes, he must calculate the effect at ordinary times and also at periods of high water, and should so construct it that ordinary and expected floods will not cause an overflow to the damage of upper owners, for he will be liable for all damages caused thereby; See the note to Mizell v. McGowan, 85 Am. St. Rep. 711.

WYANDOTTE BREWING COMPANY v. HARTFORD FIRE INSURANCE COMPANY.

[144 Mich. 440, 108 N. W. 393.]

INSURANCE Against Fire, When Void Because the Insured Property is upon Leased Ground.—If a policy contains a condition stating that it is void if the subject of insurance is a building on ground not owned by the assured in fee simple, no recovery can be had thereon for the loss of a building on leased premises, where the application for insurance was oral, and no representation was made and no question asked respecting the title, and the insurer had no notice thereof, though the policy issued was not read by the assured prior to the fire, and he had no knowledge of the condition. (pp. 462, 465.)

INSURANCE Against Fire—Evidence.—The burden of proving that the insurer had knowledge that the building insured was upon leased premises must be assumed by the assured where the policy's conditions make it void if the subject insured is upon premises on which the assured has not title in fee simple. (p. 465.)

Maybury, Lucking, Emmons & Helfman, for the appellant.

Charles H. Marr, and Dickinson, Stevenson, Cullen, Warren & Butzel, for the appellee.

440 McALVAY, J. Suit was brought by plaintiff upon a fire insurance policy of the Michigan standard form for the sum of six hundred dollars, issued by defendant to plaintiff

November 29, 1902, for one year, and covered the ice-houses of plaintiff on Detroit river in Wyandotte, Michigan. The application for insurance was verbal. The lots upon which the buildings stood were not owned by plaintiff, but were occupied by it as lessee. The land belonged to the Marx estate when the policy was issued, and was subsequently ⁴⁴¹ partitioned. Nothing was said by either party at the time the policy issued relative to the title or interest of plaintiff in and to the land upon which the property was located. Marx, president of defendant company, accepted the policy without reading or examining it, placed it in his safe and retained it, and claimed he never knew its contents. Upon the partition proceedings Nicholas Marx and John Marx each acquired title to one of these lots. They were brothers of Frank Marx, president of plaintiff company, who purchased John's lot. He was unable to agree with Nicholas as to the rent, which was to be thereafter paid by plaintiff, for the ground on which one of the ice-houses stood. Nicholas Marx ordered the ice-house removed from his lot. Plaintiff agreed to do this by December 1, 1903. The fire which destroyed the ice-houses occurred November 17, 1903. After the fire there was attached to the policy the following rider: "It is hereby understood and agreed that the interest of the Wyandotte Brewing Co. covered in policy number 20,919 is assigned to Frank Marx . . . and is his property exclusively."

The same statement was made in the proofs of the loss. The declaration in the case alleged relative to the foregoing assignment that this "indorsement attached to said policy of insurance was attached by defendant's agent under a mistaken idea of the facts in the case, and said indorsement was not authorized by the plaintiff or its officers until after said fire had occurred."

Defendant denied plaintiff's right to recover, upon the following grounds:

1. Because the building insured was upon "ground not owned by the insured in fee simple," and no written "agreement" thereof was indorsed on the policy as required by the terms thereof.

2. Because title to the ground on which the insured buildings stood changed after issuance of the policy and no written "agreement" of the change was indorsed on the policy, as required by the terms thereof.

3. Because the policy had been assigned before suit to ⁴⁴³ Frank Marx; a bill in equity is necessary to correct the claimed mistake before liability of defendant to plaintiff becomes fixed.

4. No proofs of loss were furnished within the time required by the policy.

At the close of the case each party moved the court for an instructed verdict, which was denied. It appearing that the questions involved were questions of law, by stipulation the jury were excused, and the parties agreed that the case be submitted on briefs to the court to be determined by him, and a verdict entered, as if the jury were present. The court directed a verdict in favor of plaintiff, and judgment was entered for the amount of the policy and interest.

The principal error relied upon by defendant as a reason for reversing this judgment is that the court erred in not holding that the policy was void, for the reason that the building insured was "on ground not owned by the insured in fee simple, and no written agreement thereof was indorsed on the policy as required by its terms." The policy sued upon was the regular Michigan standard policy, and the clause relied upon by defendant reads: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void . . . if the subject of insurance be a building on ground not owned by the insured in fee simple."

It is an admitted fact in this case that plaintiff never owned the ground upon which the buildings were located. The buildings, as the proofs show, were owned by plaintiff, and were located on leased ground. At the time the insurance was placed, nothing at all was said by either party as to the title to the ground. No questions were asked by defendant's agent, and no representations made by plaintiff. There was no written application. As far as the record shows, defendant or its agent had no knowledge of the condition of the title to the ground. The court, in his decision, held that the case at bar was controlled by the cases of *Hall v. Niagara Fire Ins. Co.*, 93 Mich. ⁴⁴³ 184, 32 Am. St. Rep. 497, 53 N. W. 727, 18 L. R. A. 135, and *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340. The contention of defendant is that the case is distinguishable from these cases; that the application was verbal; that the policy was issued

by defendant and accepted by plaintiff without objection, and that he is bound by the terms of his contract; citing *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. 833.

The cases above mentioned and other cases before this court have discussed this clause of the Michigan standard policy referred to. The question in the *Wierengo* case (98 Mich. 621, 57 N. W. 833) appears to be the same question involved in this suit. The insurance in that case was secured upon a verbal application. No terms of the contract were mentioned except the amount. Upon the receipt of the policy neither the insured nor her agent read it, and did not read it until after the fire. The policy was the Michigan standard policy for one thousand dollars, containing the same clause as to title to land and mortgages on personalty as in this case. It covered a stock of merchandise upon which, at the time, there was a chattel mortgage for over twelve hundred dollars. Neither defendant nor its agent had any knowledge of this mortgage at the time the policy issued. Justice Grant, speaking for the court, said: "In this case, where there was no written application nor any terms of the policy agreed upon by parol except the amount, the insured must be charged with knowledge that the policy he receives contains the contract, binding upon him as well as the insurer. He must know that the policy, which is the contract, contains the usual terms of such instruments. He may not lay it aside without reading, and when he seeks to recover upon it, and finds that, under its plain provisions, he cannot recover, say: 'I did not read it. The insurer did not tell me what it contained. I did not know that it was necessary to tell him about the title and condition of my property, and therefore I am not bound by its terms.' Had Mr. Pearson or his principal read the contract—which he could have done in a few moments—they would at once have known these plain and important conditions, which the defendant had the clear right to insert, and to make a condition of its validity. ⁴⁴⁴ Certainly the insured must be held to some degree of diligence in obtaining knowledge of the contracts to which they are parties. Ignorance will not relieve a party from his contract obligations. The law only relieves him therefrom in cases of fraud, mistake, waiver, or estoppel. An insurer is not required by the law to inquire into the condition of the title to the property insured, or to inform the in-

sured of all the conditions and terms of the policy to be issued, or to read it to him, or inform him of its contents. When received and accepted without objection, he must be bound by its terms unless these terms are waived by the insurer. This is the law of contracts, and there is no reason or authority for holding that an insurance contract is an exception thereto."

We think this is decisive of the question before us, and unless the cases relied upon by the court, and other cases cited by counsel for plaintiff, overrule it, we consider the question as to the construction of the part of the contract under consideration settled in this state. The fact that in this case the question is as to the title to the ground upon which the insured buildings were situated, and in the case just cited was as to a chattel mortgage on personal property makes no difference. Each requirement is of equal binding force as a part of the same stipulation in the contract. The only distinction being as to the class of property to which each applies. The following authorities are in accord with the opinion above quoted: *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Dumas v. Insurance Co.*, 12 App. Cas. (D. C.) 245, 40 L. R. A. 358.

A review of the cases claimed by plaintiff as contrary to or overruling the *Wierengo* case (98 Mich. 621, 57 N. W. 833), will, we think, disclose that such is not the fact. In *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340, opinion by Champlin, C. J., defendant, among other reasons, denied plaintiff's right to recover, because she was not sole and unconditional owner of the property and did not own the ground, upon which the insured building stood, in fee simple, in violation of the conditions of the policy. The policy covered the ⁴⁴⁵ building, stock of groceries, and so forth, and store furniture and fixtures contained in the building. The policy as to the real estate interest reads: "Insure Mrs. Margaret Hoose to the amount of . . . one thousand dollars on the two-story frame building occupied as a grocery store and dwelling situated on the northwest corner of Milwaukee and Beaubien Sts., Detroit, Mich., . . . against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property."

At the time the insurance was written, she held under a land contract and there was a mortgage on the premises. The application was verbal, and it was claimed, and the jury found specially, that defendant's agent had been told, and knew at the time the policy issued, the condition of the title. This court held that such verbal statements became a part of the contract, and the finding of the jury was conclusive upon defendant that it had knowledge of the condition of the title. In construing the clause in the policy relative to the title to the ground on which the building stood, which is the same as in the policy in the suit at bar, the court says: "In construing this portion of the policy the whole must be taken together. Now, the object sought to be accomplished by the person applying for insurance was to obtain indemnity against loss by fire of her interest in the building. If the insurance company which made out this policy, upon the verbal application to its agent, had desired to know what interest it was insuring it should have stated it in that part of the policy pertaining to the risk."

And further: "Construing this portion of the policy with the testimony in the case, and with the fact that the company issued the policy to Mrs. Hoose without stating in the policy what her interest was, but insuring the building against loss by fire to an amount not exceeding the interest of the assured in the property, we think it must be held that the defendant understood the condition of the title and intended to insure whatever interest Mrs. Hoose had which ⁴⁴⁸ was insurable, not exceeding the amount named in the policy."

The court also held that the requirements of the policy as to indorsements of changes of title referred only to such changes as arose after its delivery and acceptance.

In *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 32 Am. St. Rep. 497, 53 N. W. 727 (opinion by McGrath, J.), the suit was brought by an assignee of the policy. This assignment was made by the consent of the company and defendant's agent was told that the insured has assigned his interest in the policy to plaintiff. The court held that the defendant, by consenting to the assignment, had made a contract with plaintiff, and was estopped from defending against the assignee on account of prior breaches unknown to either party; that the information it received at the time of the as-

signment was sufficient to put it upon inquiry. It also held that the assignor had an insurable interest. In this case the application was verbal. No statement as to the condition of the title was asked for or given. In its reference to the Hoose case (84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340), the court was in error as to its statement that the facts were precisely the same. In the Hoose case (84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340), as above already stated, defendant company was informed of the exact condition of title when the insurance was written. This case, however, was not determined and decided upon that question, as already appears.

In *Guest v. New Hampshire F. Ins. Co.*, 66 Mich. 98, 33 N. W. 31, opinion by Campbell, C. J., the application was verbal, and the insured stated he held under a land contract. The policy read: "Lot held by virtue of a land contract."

In *Gristock v. Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 634, opinion by Grant, J., the application was not in writing and defendant's agent was informed of a mortgage.

In *Miotke v. Milwaukee M. Ins. Co.*, 113 Mich. 166, 71 N. W. 463, opinion by Hooker, J., insured was a foreigner unable to write and speak English. He stated that he held the land on which the house was situated on contract. The contract was, in fact, to himself and wife jointly.

⁴⁴⁷ The most recent case before this court, bearing upon the question under consideration, is *Brunswick-Balke-Collender Co. v. Assurance Co.*, 143 Mich. 29, 105 N. W. 76, opinion by Blair, J. Plaintiff was the owner of certain saloon furniture and fixtures, billiard and pool tables, of which it had made a conditional sale retaining title in the property, and also upon which it had taken a chattel mortgage to secure the title notes. The application was verbal and the record does not show that any specific representations were made as to title. The court said: "In the case at bar the plaintiff had an insurable interest. It had the legal title and was the owner of the property insured subject to the rights of Rawson Bros. to acquire its title by performance of its contract of sale. The only actual description of their interest in the property contained in the policy was the language 'eleven hundred dollars on their saloon furniture and fixtures, etc.' This was a true description, and defendant

cannot complain because of its own negligence in failing to require a more specific description."

The cases cited in the opinion have already been discussed. The case decides that the description of the property in the policy was not untrue; that the owner of the legal title of personal property need not disclose the fact that he had agreed to sell such insured property upon conditions reserving title. This is supported by authority. A conditional sale in the law of fire insurance is not an alienation: 3 Joyce on Insurance, sec. 2284, and cases cited. Earlier Michigan cases cited by plaintiff to the point that the insured need not disclose the state of title to the property insured are not in point, for the reason that the insurance contracts did not so require, or the facts showed waiver or estoppel. In the cases discussed, where the opinion of this court has not been given, enough of the facts of each case has been stated to show some knowledge as to title, or waiver on the part of the insurer. This court has never in terms overruled the case of *Wierengo v. American Ins. Co.*, 98 Mich. 621, 57 N. W. 833, and it is evident such has not been the intention. Some members of the court who concurred ⁴⁴⁸ in that case have sat in all the cases hereinabove considered, except the *Guest* case, (66 Mich. 98, 33 N. W. 31), and in no instance has the decision in that case been referred to or questioned, for the undoubted reason that these cases were distinguished by them.

In this case, at the time that the policy issued, plaintiff was not the owner of the land in fee simple. The burden of the proof to show knowledge in the defendant of this fact was upon the plaintiff. This it failed to do. The defendant had no such knowledge; therefore the policy was void. The court should have directed a verdict for defendant. We find no other errors in this case.

Judgment is reversed, and a new trial ordered.

Grant, Ostrander, Hooker and Moore, JJ., concurred.

Although a Policy of Insurance declares that it shall be void if the interest of the insured is other than the unconditional or sole ownership, such condition, it would seem, is waived if there is no written application made for a policy and no questions concerning the title are asked: *Dooley v. Hanover Fire Ins. Co.*, 16 Wash. 155, 58 Am. St. Rep. 26. If an insured has an insurable interest in the property, and in good faith applies for insurance thereon, and makes no actual misrepresentation or concealment of his interest therein, and the in-

insurance company refrains from making inquiry concerning his interest, issues a policy to him, and accepts and retains his premium, it must be presumed to have knowledge of the condition of his title, and to insure the property with such knowledge: *National Fire Ins. Co. v. Three States Lumber Co.*, 217 Ill. 115, 108 Am. St. Rep. 239.

GREENMAN v. O'RILEY.

[144 Mich. 534, 108 N. W. 421.]

SEDUCTION, Averment of Plaintiff's Chastity, What Amounts to.—If, in an action for the seduction of the plaintiff, the complaint avers that she was seduced by the defendant, this is equivalent to an averment of her previous chastity. (p. 467.)

SEDUCTION, Promise, Deceit, Artifice and Influence Sufficient to Sustain Action for.—If a man states to a girl seventeen years of age that he likes her the best of any girl he ever knew, that she will never be sorry and never regret it, and that she can always live with him and be happy, he may be held liable for her seduction under a statute creating liability for seduction under such "promise, artifice or influence as will overcome the scruples of a chaste woman." (p. 467.)

SEDUCTION—Chastity, Want of, Evidence of, When Admissible.—Under the General Issue, the plaintiff's want of chastity is admissible in actions of seduction without giving any notice of intention to offer such evidence, and this remains true though the trial court has adopted a rule declaring that an affirmative defense must be clearly set forth in the notice added to the defendant's plea. (p. 468.)

SEDUCTION—Presumption of Chastity.—In an action for seduction, previous chastity is presumed. (p. 468.)

SEDUCTION, Woman Allowed to Maintain an Action for.—Under a statute declaring that it shall not be necessary in an action for seduction to allege or prove any loss of service in consequence thereof, but if the female be a minor when seduced, action may be by her father, mother, or guardian, and if of full age, the action may be by the father or any other relative who shall be authorized by her to bring the same, there is given a right of action which may be enforced by her in her own name. (p. 469.)

SEDUCTION, Necessity of Chastity to Support Action for.—Under a statute giving to a woman the right to sue for her seduction, it is fatal to the action that she was not a chaste woman at the time of the alleged seduction. (pp. 469, 470.)

EVIDENCE, Hearsay, When Inadmissible.—In an action for seduction, the plaintiff should not be permitted to testify that she had been told that the defendant had stated in his store that she was a mother, that he could prove it, and that he was not the cause, such evidence is hearsay. (p. 470.)

SEDUCTION is Correctly Defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persua-

sions, or wiles, which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to sexual embraces of the person accused. (p. 471.)

APPEAL AND ERROR—Waiver of Exception by Failure to Argue.—Where the brief of the appellant merely calls the attention of the appellate court to the refusal of the trial court to give certain requested charges, such court will assume that it is not expected to give attention to such requests. (p. 471.)

F. A. Kulp and Stewart & Jacobs, for the appellant.

Walter S. Powers, for the appellee.

535 **CARPENTER, C. J.** Plaintiff brought this suit to obtain damages for seduction. She secured a verdict and judgment in the lower court. Defendant seeks a reversal of that judgment upon several grounds.

1. He contends that the court erred in denying his motion, made at the conclusion of plaintiff's case, to strike out all the testimony upon the ground that the declaration did not aver the plaintiff's chastity. The declaration did aver that defendant seduced the plaintiff. This, as will hereafter appear in this opinion, was an averment that she was thereby drawn from the path of virtue. The declaration then did in effect aver chastity and sufficiently averred it. The trial court did not therefore err in overruling this motion.

2. Defendant contends that the trial court erred in overruling his motion to strike out plaintiff's testimony on the ground that she failed to show such "promises, deceits, artifices, or influence that would overcome the scruples of a chaste woman." Plaintiff, who was a girl only seventeen years of age, testified: "He told me . . . he liked me the best of any girl he ever knew. He told me he was worth between twenty thousand dollars and thirty thousand dollars. He did not say it right out—say that he would marry me, or anything like that. He always said I never would be sorry, and would never regret it, and he said I always could live with him and be happy. That is the way he worded it."

This testimony was sufficient to warrant the jury in deciding that defendant made such promises, deceits, artifices, 536 or influence as would overcome the scruples of a chaste woman: See *Hallock v. Kinney*, 91 Mich. 57, 30 Am. St. Rep. 462, 51 N. W. 706.

3. The trial court prevented defendant from proving by the cross-examination of plaintiff, and by the introduction

of other testimony, that plaintiff lacked chastity at the time of the alleged seduction, upon the ground that with his plea he had given no notice of his intention to offer such testimony. This testimony was admissible under the plea of the general issue, unless made inadmissible thereunder by subdivision b of circuit court rule 7. That subdivision reads: "An affirmative defense, such as payment, release, satisfaction, discharge, license, fraud or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration, must be plainly set forth in a notice added to the defendant's plea."

Plaintiff's lack of chastity is not an affirmative defense, under the foregoing rule, unless it was "affirmative matter [which] seeks to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration."

It is contended by plaintiff that testimony tending to prove plaintiff's lack of chastity was "affirmative matter," under the language above quoted, because the presumption of chastity made it the duty of defendant to introduce such testimony. It is true there is a presumption of plaintiff's chastity: *People v. Brewer*, 27 Mich. 134. This presumption transferred from plaintiff to defendant the duty of first introducing testimony touching the issue of chastity, but it by no means follows that in introducing that testimony the latter was making an affirmative defense, within the meaning of circuit court rule 7. If it is true that plaintiff's declaration avers by implication that she was chaste at the time of the alleged seduction, and that she cannot recover if she was not—and I shall hereafter endeavor to prove that this is true—her suit necessarily puts her chastity in issue. The presumption of chastity ⁵³⁷ under consideration merely takes the place of evidence of chastity. It does not remove the issue of chastity from the case. Defendant, when offering testimony to disprove chastity, is merely denying an essential fact asserted by plaintiff, and is not making an affirmative defense. Though the presumption of chastity compels the defendant, instead of the plaintiff, to first introduce testimony on the issue of chastity, the latter, when introducing it, is not bringing into the case "affirmative matter to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration," within the meaning of circuit court

rule 7. He is merely offering testimony which tends to prove that plaintiff did not have, and never had, "the cause of action set forth in her declaration."

The foregoing contention that, in introducing testimony tending to prove that plaintiff lacked chastity at the time of the alleged seduction, defendant is not making an affirmative defense, rests upon the assumption that plaintiff had no cause of action, unless she was chaste at the time of the alleged seduction. It is therefore essential that I prove that this assumption is well founded. At common law the seduction of a female gave her no right of action. Her right of action is statutory. It is given in this state by section 10,418 of 3 Compiled Laws, which reads: "It shall not be necessary in any action on the case for seduction hereafter to be brought to allege in the declaration, or to prove on the trial, any loss of service in consequence of such seduction; but if the female seduced be a minor at the time of the seduction, the action may be brought by her father, mother, or guardian; and if such female be of full age, the action may be brought by her father, or any other relative who shall be authorized by her to bring the same."

We have held that this statute gives to the woman seduced a right of action which she may enforce in her own name: *Watson v. Watson*, 49 Mich. 540, 14 N. W. 489; *Ryan v. Fralick*, 50 Mich. 483, 15 N. W. 561. This right of action is described ⁵³⁸ in the statute as an "action on the case for seduction." The question arises, What is meant by seduction for which the female has a right of action? This court has been called upon several times to define seduction in enforcing section 11,694 of 3 Compiled Laws, which makes it a crime "to seduce and debauch any unmarried woman," and we have uniformly held that the offense was not committed unless the woman seduced was chaste at the time of her seduction (see *People v. Clark*, 33 Mich. 112; *People v. De Fore*, 64 Mich. 693, 8 Am. St. Rep. 863, 31 N. W. 585; *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257; *People v. Smith*, 132 Mich. 58, 92 N. W. 776), saying at the same time that, "although the female may have previously left the path of virtue, . . . yet, if she has repented of that act and reformed, she may again be seduced": *People v. Clark*, 33 Mich. 112. On the other hand, in a suit brought by a parent for the seduction of his child, this court said that the child's

lack of chastity "would have weight in mitigation of damages, but would not be a complete answer to the action": *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696. It should be borne in mind, however, that in this latter case we were not called upon to define seduction. When a parent brings suit to recover compensation from one who has debauched his child, proof of seduction is not essential to the right of recovery. In those cases the plaintiff is entitled to recover if the illicit intercourse has resulted in legal injury: See *Akerley v. Haines*, 2 Caines (N. Y.), 292; *McAulay v. Birkhead*, 35 N. C. 28, 55 Am. Dec. 427; *Bigelow on Torts*, 4th ed., p. 167.

Can we say the word "seduction" has two distinct legal definitions in this state? Can we say it has one meaning when a woman brings suit for damages under the statute last above quoted, and another and different meaning when her seducer is prosecuted under the criminal statute? To answer this question in the affirmative would, in my judgment, be illogical and productive of unnecessary confusion. Seduction, as a statutory cause of action, is to be defined precisely as it has been defined in construing the criminal statute. Plaintiff was not seduced, ⁵³⁹ therefore, if she was not chaste—remembering (see *People v. Clark*, 33 Mich. 112) that her chastity, though once lost, may be regained by repentance and reformation—at the time of her seduction. The trial court, as will hereafter appear, defined seduction in accordance with these views, but he erred in excluding the testimony under consideration which tended to prove that plaintiff was not chaste at the time of her seduction.

4. Plaintiff testified that she had been told by third persons that defendant stated in his store "that I was a mother. He said that he could prove that he was not the cause, though." This testimony was admitted against the objection of defendant that the same was incompetent, irrelevant and immaterial and hearsay. It was clearly hearsay, and should not have been admitted.

5. The trial court defined seduction to be: "The act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions or wiles, which are calculated to have, and do have, that effect, and resulting in her ultimately

submitting her person to the sexual embraces of the person accused."

Defendant complains of this definition. It was correct: See *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257; *People v. Smith*, 132 Mich. 58, 92 N. W. 776.

Other complaints are made in defendant's brief. Some of these complaints are answered by elementary principles of law, and they need no discussion. Some of these complaints relate to discretionary rulings of the trial judge, and there was no abuse of that discretion. Some of these complaints are based upon no exception, and they relate to rulings which we cannot review without exceptions. In support of other complaints the brief contains no argument. We illustrate these last complaints by quoting from defendant's brief: "Exceptions 52 to 61, inclusive, relate to the refusal of the court to give defendant's request to charge, and we call the court's attention to such requests: Record, pp. 540 108-112. Exception 63 relates to such portions of the court's charge as are found in defendant's bill of exceptions: Record, pp. 138, 139."

We assume that it was not expected that we should consider such complaints.

For the errors pointed out, the judgment is reversed, and a new trial granted.

McAlvay, Grant, Blair and Moore, JJ., concurred.

Civil Actions for Seduction are discussed in the notes to *Weaver v. Bachert*, 44 Am. Dec. 162; *Bradshaw v. Jones*, 76 Am. St. Rep. 659. At the common law it seems that a woman could not recover damages for her own seduction. The rule is otherwise now, however, in many of the states: See the notes to *Weaver v. Bachert*, 44 Am. Dec. 165; *Bradshaw v. Jones*, 76 Am. St. Rep. 666. In Rhode Island, evidence of seduction is not admissible in aggravation of damages in an action for breach of promise to marry: *Wrynn v. Downey*, 27 R. I. 454, 114 Am. St. Rep. 63.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

RICHARDSON v. BUSCH.

[198 Mo. 174, 95 S. W. 894.]

CONVERSION—Title—Collateral Attack.—If an administrator sues for damages for the wrongful conversion of certificates of stock belonging to the deceased, the issue is the title of the certificates and not the authority of the administrator to take charge of the estate of the deceased who died in another state, and the question whether the administrator's authority can be attacked in a collateral proceeding is not in the case. (p. 473.)

CONVERSION—Pleadings—Admissions.—If an administrator's petition in general terms charges conversions, and, in addition charges specifically how such conversion was made, namely, that defendant had in his possession certificates of stock in a foreign corporation and delivered them to decedent's administrator in the state where the decedent died, there is nothing in the petition from which it can be inferred that the certificates were lost to the estate, and a demurrer to the petition does not admit a state of facts on which the defendant would be liable for a conversion. (p. 474.)

EXECUTORS AND ADMINISTRATORS—Stock in Foreign Corporation—Place of Ownership.—If the owner of corporate stock dies in the state where the corporation is organized, leaving the certificates in another state, a public administrator taking charge of his estate situated in the latter state has no right to claim such certificates of stock which are only evidence of the ownership of the stock. (p. 475.)

EXECUTORS AND ADMINISTRATORS—Stock in Foreign Corporation—Place of Ownership and Administration.—If the owner of corporate stock dies in the state where the corporation is organized, leaving the certificates of such stock in another state, the stock itself belongs to the administrator appointed in the state where the owner thereof dies, and the courts of the state where the certificates of stock are situated have no power to seize the stock at the instance of an administrator appointed there, as the stock itself is beyond the process of such courts, which have no power to apply such certificates to the payment of the decedent's debts in that state nor to distribute them among the kin of such decedent. (p. 477.)

Rassieur, Schnurmacher & Rassieur, for the appellant.

Finkelnburg, Nagle & Kirby, for the respondent.

¹⁷⁰ VALLIANT, J. The petition states that the plaintiff ~~is~~ the public administrator in the city of St. Louis, and that in that right he has taken charge of the estate of John C. De La Vergne, deceased, who at the time of his death was a resident of the state of New York; that De La Vergne in his lifetime, being the owner of five hundred shares of stock in a New York corporation, called the De La Vergne Refrigerating Machine Company, evidenced by two certificates for two hundred and fifty shares each, delivered those certificates to the defendant Busch to indemnify him against his liability on a bond for twenty-four thousand dollars which he had signed as surety for the De La Vergne corporation at the request of De La Vergne in an attachment suit in the city of St. Louis against the corporation; that while the attachment suit was pending De La Vergne died in New York, and plaintiff, in his official capacity as public administrator, immediately took charge of the De La Vergne estate in Missouri; that thereafter the attachment suit was dismissed and Busch's liability on the bond ceased; that thereupon the plaintiff demanded of Busch the certificates of stock, but Busch refused to deliver the same ¹⁸⁰ "and wrongfully converted the said certificates and shares of stock to his own use," to the plaintiff's damage in the sum of fifty thousand dollars, for which sum he asks judgment. The court sustained a demurrer to the petition, and the plaintiff declining to plead further, judgment for defendant was entered, and plaintiff appealed.

1. The first point made in the brief of appellant is that his authority as public administrator to take charge of the estate of the deceased De La Vergne cannot be questioned in a collateral proceeding. That is a correct statement of the law, but that rule of law is not involved in this case. The defendant is not in this case denying the authority of the plaintiff to sue for and recover anything that the deceased De La Vergne left in the way of an estate in Missouri, but he is denying that the stock in the New York corporation of which he holds the certificates were ever in Missouri, and, therefore, he says that it does not belong to the Missouri administrator. It is a question of title to the thing sued for, not the official character of the plaintiff.

2. It is also said that the petition charges a conversion of the stock, and, it is argued, the legal effect of that act was to

change the character of the asset from stock in the corporation to a right of action for the tort, and that right of action exists where the wrongdoer is found.

It is true the petition charges in general words a conversion of the stock, but in addition to the general charge it specifies how the act of conversion was done, and from the specific averments we find that the only thing the defendant ever had in his possession was the certificate of the stock, and what the plaintiff construes to be conversion consists alone in the refusal of the defendant to deliver to him the certificate when demanded. There is nothing stated in the petition from which the inference can be drawn that the defendant ever made any such use of the certificate as that the ¹⁸¹ stock itself was lost to the estate. If the averments in the petition relied on to constitute a conversion really have that legal effect, then the conversion would be complete, even though the fact were that the defendant had delivered the certificate to the New York administrator, and that fact would be no defense to this action. Unless, therefore, we are prepared to hold that, even though the defendant gave the certificate to the New York administrator (and that fact in the oral argument was admitted), still he was guilty of conversion of the stock, we cannot hold that the demurrer to this petition admits a state of facts on which the defendant would be liable as for conversion.

3. The real question in this case is, Was this stock in Missouri when De La Vergne died? The certificate was here and in the hands of the defendant, and that is the only fact on which the plaintiff relies to sustain his claim. The corporation was in New York.

To the learning and industry of counsel on both sides of this case we are indebted for an array of all the principal authorities supporting their respective contentions. We will not attempt a review of the authorities discussed, but will be content with citing some of them, referring the inquirer to the briefs themselves, which will be reported, for further light.

To the general proposition that the certificate is not the stock, but the mere evidence of the ownership of the stock, there is no denial: Cook on Corporations, sec. 485; Thompson on Corporations, sec. 2438; Armour Bros. B. Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690;

Caffery v. Choctaw Coal Min. Co., 95 Mo. App. 174, 68 S. W. 1094; *Jellenik v. Huron Copper Co.*, 177 U. S. 1, 20 Sup. Ct. Rep. 559, 44 L. ed. 647.

In *Armour Bros. B. Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690, above cited, this court laid down the principle which practically settles the law of this case. In that case the bank held in St. Louis, as custodian for the owner, certificates of stock in a Texas corporation; in a suit by attachment against ¹⁸² the owner a writ of garnishment was served on the bank aimed to attach the stock; the court held that the stock was not attached. The court rested its decision on two propositions: 1. That our statute prescribing the mode of serving writs of attachment and garnishment to reach stock in a corporation was intended only to reach stock in a domestic corporation, and no method was prescribed for reaching stock in a foreign corporation; 2. That the stock itself was not within the state although the certificate was here. In discussing the second proposition the court, after quoting from some decisions, said: "But be that right what it may, certificates of stock are not the stock itself—they are but evidence of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. As was well said by the supreme court of Pennsylvania: 'Stock cannot be attached by attaching the certificate any more than lands situated in another state can be attached by an attachment in Pennsylvania served on the title deeds to such land'": *Christmas v. Biddle*, 13 Pa. 223. In that case a man in Mississippi had sent to a bank in Philadelphia for sale certificates of stock in a Mississippi corporation; in an attachment suit against the owner an attempt was made to levy on that stock by seizing those certificates, and the court held that it could not be done, using the language above quoted.

Our process cannot reach beyond our state boundaries, and, as suggested in the quotation from the Pennsylvania court, if our General Assembly should pass an act essaying to authorize the levy of execution on land in another state by seizing the title deeds that happened to be within our borders, the act would be unavailing. If the real thing that is sought to be taken hold of by the process is not in Missouri, it is beyond our reach, and for that reason doubtless our legislature has never attempted to prescribe a mode for levying an

attachment on stock in a foreign corporation. ¹⁸³ The court, in *Armour v. Bank*, above mentioned, was, therefore, not content to rest the decision alone on the fact that there was no statute directing a method of attaching stock in a foreign corporation, but it declared the fundamental doctrine that the res was not within our borders.

In *Jellenik v. Huron Copper Co.*, 177 U. S. 1, 20 Sup. Ct. Rep. 559, 44 L. ed. 647, there was the converse of the case before us; that suit was brought in the United States circuit court for the western district of Michigan; the subject matter of the suit was stock in a Michigan corporation, the owners of the stock and holders of the certificates lived in Massachusetts, and it was contended that since they were not within the western district of Michigan, and were personally beyond the reach of process, the court had no jurisdiction of the case; but it was held that the stock was in Michigan and the court could there lay its hands on the thing in controversy, and having done so, it acquired jurisdiction and could bring the owners in by publication. In its opinion the United States supreme court said: "The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is, and must be, in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner."

If the property is not here so that it can be reached by the process of a court of general jurisdiction, how can it be taken hold of by a court of limited or special jurisdiction?

In *Re Estate of Ames*, 52 Mo. 290, the administratrix had inventoried the debts due the estate not only in Missouri, but in Mississippi also, and had, under an order of the probate court of St. Louis county, sold the whole list. It was held that the sale was void in so far ¹⁸⁴ as it attempted to cover the debts outside of Missouri. The court said: "The question here, however, is a question of jurisdiction over such assets after the death of the surviving partner. In such case fiction gives way to truth, and the real situs can, and must be, inquired into." For further authorities on this point we refer to the brief of counsel for respondent.

In our statutes on the subject of the administration of estates of deceased persons there is nothing to indicate a purpose to reach beyond our limits or to authorize an administration founded on fictitious assets.

Section 292 of our laws of administration declares it to be the duty of the public administrator "to take into his charge and custody the estates of all deceased persons in the following cases: fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same," etc. The word "papers," used in that clause, refers to papers which constitute the assets or a part of the assets of the estate; in other words, papers in which there is a property value. The language is "papers or other estate." It was not the intention of the lawmakers to authorize the public administrator to take charge of anything that was not in the nature of property or assets. If the deceased left nothing in this state that could be applied to the payment of debts or to distribution among his next of kin, there is nothing here to administer.

It is alleged in the petition that debts to a large amount have been established and allowed against the estate in the probate court here, but that fact is of no influence at all. The public administrator would have as much right to take charge of property or assets here if there were no debts as he would if there were debts; the interests of the distributees are as important as those of the creditors. The plaintiff has added nothing to his case by stating in his petition that debts have been proven against the estate. His right to administer ¹⁸⁵ depends, not on what is to be done with the property at the end of the administration, but on the fact that there was property or assets in this state belonging to the deceased at the time of his death.

A certificate that a certain person owns so many shares of stock in a corporation is but evidence of that fact; it is not the shares of stock. The thing of value is the stock; the thing that De La Vergne in his lifetime owned was the stock, and if that was in New York at the time of his death, it cannot be made the basis of an administration in this state, even if our statute essayed to make it so.

If a chattel mortgage is executed on personal property which is in New York, the presence of the paper writing in

this state does not constructively bring the property within our jurisdiction. In such case, if one holds the mortgage here he may thereby acquire an interest in the property, but to realize the interest he must go into the state where the property is.

If a cargo of grain is shipped from St. Louis to New York, the bill of lading may be retained here and may be sold for value, but the thing sold is not the bill of lading, but the cargo of grain which it represents, and if that should be destroyed, the only thing that is of property value is destroyed, though the bill of lading is safe, and if the holder of the bill of lading is entitled to recover of anyone for the destruction, it is for the destruction of the grain. But if the bill of lading should be destroyed, the owner loses no property; he is only deprived of the best or most convenient evidence of his title.

The chattel mortgage may be hypothecated and so may the bill of lading, but the delivery of such a collateral is only a symbolical delivery of the property which it calls for; so also it is with a warehouse receipt.

In the case at bar, suppose while this certificate of stock was in the hands of the defendant it had been ¹⁸⁶ destroyed by an accidental fire, and that that was the condition when the pledgor died, then where was the property? Could a Missouri administrator have acquired any right to administer on the stock which was then in New York? Stock in a corporation is the right of the owner to share in the profits of the operation of the corporation or in the proceeds of its property. That right may exist in one who has subscribed and paid for the stock although no certificate has been issued to him. The situs of the interest is the situs of the corporation.

The fact that certificates of stock are handled in every-day commerce and treated as the stock itself does not alter the fact that it is merely the representative of the stock and the evidence of ownership.

There may possibly be a value in the certificate itself apart from the value of the stock which it represents, on the same theory that there may be a value in the title papers to other kinds of property apart from the value of the property itself to which they relate. But that value is only estimated in the light of the convenience of such papers as evidence.

If a party wrongfully obtains or retains possession of such papers, the owner of the property might have his action to recover their possession or damages for their detention, but such damages, if recovered, are no part of the value of the property to which the title papers relate. And no one could maintain such a suit except the owner of the property. Ownership of the title papers is incident only to ownership in the property.

If this were a suit to recover for the loss or destruction of the certificate—that is, the title paper to this stock—brought by the owner of the stock, a different question would arise.

As we understand the theory of the plaintiff's case, he is seeking to recover, not the mere value of the paper as evidence, but the value of the stock itself; his position is that the certificate is the stock, but in that he is mistaken; the stock is in New York, and belongs to ¹⁸⁷ the administrator there. Right to the possession of the title paper is incident to the ownership of the property.

In the brief for the Missouri administrator in this case it is said that "the contention of the New York administrator, if followed to its logical conclusion, would lead to strange results," because if, when the Missouri administrator calls on Mr. Busch to deliver to him the certificate, he could lawfully refuse to do so on the ground that it belonged to the New York administrator as an incident to the ownership of the stock, and if, when the New York administrator made a like demand he should again refuse, there would be no way of compelling him to surrender it, because a New York administrator could not maintain a suit in Missouri.

Whether if the defendant had refused to deliver the certificate to the New York administrator, the latter could have maintained a suit here to recover the same we are not called upon to say in this case. We frequently hear it said that a foreign administrator, as such, cannot maintain a suit in the courts of this state. That is true as a general rule, and is true as applied to the facts of the cases in which that expression is found in our books; but the language used is not entirely accurate, and does not express exactly what we mean in the ordinary use of it; what we really mean to say is that an administrator appointed in another state does not, by virtue of his appointment, acquire title to personal property which the intestate left at his death in this state. He

cannot maintain a suit here for such property for the simple reason that he has no title to the property, not because the doors of our courts are closed against him, for the doors of our courts are open to everyone to sue and recover in this state for anything that belongs to him that is here wrongfully detained by another.

Judge Story has said: "And here it may be necessary to attend to a distinction important in its nature ¹⁸⁸ and consequences. If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased, there situated, into his own possession, so that he has acquired the legal title thereto according to the laws of that country, if that property should afterward be found in another country, or be carried away and converted there against his will, he may maintain a suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in character of trustee for other persons": Story on Conflict of Laws, 8th ed., sec. 516.

A man owns a farm just across our line in Kansas, on which he has a herd of cattle; he dies and an administrator is appointed and qualified in Kansas, and takes possession of the estate; the legal title to the herd of cattle vests in the Kansas administrator, but some one leaves the gate open and the cattle stray across the line into Missouri, and some one here takes possession of them—does the act of the cattle in straying across the line extinguish the title of the Kansas administrator, or are the doors of our courts closed against him if he seeks to recover his own? That question is not in this case, nor is the New York administrator here suing Mr. Busch for the possession of the certificates, so we need not say what we would do if the New York administrator had been compelled to sue here for possession of these certificates.

Our conclusion is, that the stock was never in Missouri; therefore, the Missouri administrator never acquired any title to it. The judgment is affirmed.

All concur, except Lamm, J., who dissents.

Stock Certificates are said to be mere evidences of the ownership of shares: *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910.

For Purposes of Administration, the situs of a certificate of stock belonging to the decedent is in the state where the corporation was organized and has its principal place of business: Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80; Murphy v. Crause, 135 Cal. 14, 87 Am. St. Rep. 90.

MATLOCK v. WILLIAMSVILLE, GREENVILLE AND ST. LOUIS RAILWAY COMPANY.

[198 Mo. 495, 95 S. W. 849.]

NEGLIGENCE—Death of Minor Child—Emancipation.—The right of a parent to recover for the negligent killing of his minor son in no way depends upon the fact of the emancipation of the son prior to his entering into defendant's employment. The right to recover does not depend upon the services which the deceased could have rendered to his father. (p. 483.)

NEGLIGENCE—Death of Minor Child—Misrepresentation of Age—Right of Parent to Recover.—If a minor child is negligently killed by his employer, the fact that he misrepresented himself to be of age in order to obtain the employment, and that his employer accepted him, relying upon his representations, does not bar a suit by the minor's parent to recover the damages provided by statute for the negligent killing of a minor child. (p. 484.)

NEGLIGENCE—Injury to Minor Child Employé—Misrepresentation as to Age.—Although a minor child applying for employment misrepresents himself to be of age, and such representation is believed and relied upon by his employer, such facts do not bar the minor from recovering for injury negligently inflicted upon him by his employer. (p. 484.)

NEGLIGENCE—Injury to Minor Child Employé—Misrepresentation of Age—Estoppel to Recover.—Although a minor child applying for employment misrepresents himself to be of age, and such representation is believed and relied upon by his employer, otherwise he would not have been given employment, these facts do not bar by estoppel in pais the right of either the minor employé or of his parent to recover for injury inflicted through negligence upon such minor by his employer. The action is one of tort, and does not arise out of a violation of contractual relations. (pp. 484, 485.)

O. L. Munger and C. M. Hay, for the appellant.

Gamble, Petherbridge & Taylor, for the respondent.

⁴⁸⁶ GANTT, J. This is an action brought by Jason L. Matlock against the defendant railway company for damages to the amount of five thousand dollars, under section 2864 of the Revised Statutes of 1899, for the killing of plaintiff's minor son.

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⁴⁹⁷ The deceased was at the time of his death eighteen years and eight months old, and unmarried. The plaintiff is his sole surviving parent. The defendant is a railroad company owning and operating a line of railroad in Wayne county, Missouri. Deceased at the time of his death, and for two weeks prior thereto, was in the employ of the defendant company as a brakeman on a log train running out to the woods from Greenville. While at his post of duty on said train on the twenty-fourth day of April, 1901, he was killed, and this action is instituted for the damages arising to his father from his death.

There was evidence tending to show that the death of the son of plaintiff was the result of negligence and unskillfulness of the defendant's conductor in charge of the train, but it is unnecessary to set forth the evidence on this point, for the reason that the only point alleged by plaintiff on this appeal is the alleged error of the court in giving the following instruction: "The court instructs the jury that if you believe from the evidence that the son of plaintiff fraudulently represented himself to be twenty-one years of age in order to secure employment as a brakeman on defendant's railroad, and further find from the evidence that prior to his employment on the railroad, plaintiff had permitted him to be employed by the lumber company at Greenville, and had permitted him to receive his wages for such work without objection, and if you further find the defendant's superintendent believed the statement and representation of said son of plaintiff that he was of age, and further find that plaintiff learned of such before the death of his son and made no objection to said employment by defendant railroad company, then in that event the plaintiff is not entitled to recover."

There was evidence tending to prove that the deceased Jason Matlock did represent himself to be ⁴⁹⁸ twenty-one years of age for the purpose of securing employment from the defendant railroad, and that this representation was believed by the defendant's superintendent. There was also evidence that, prior to his employment by the defendant, the deceased worked for the Holliday-Klotz Land and Lumber Company, and received a greater part of his wages therefor without any objection on the part of his father, the plaintiff herein.

There was evidence also that the plaintiff learned of his son's employment as brakeman about four or five days before the latter's death, and in the interim made no objection to the same.

This action is predicated on section 2864 of the Revised Statutes of 1899, which provides that: "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé whilst running, conducting or managing any locomotive, car or train of cars, . . . the corporation, individual or individuals in whose employ any such officer, agent, servant . . . or employé shall be at the time such injury is committed, or who owns any such locomotive . . . at the time any injury is received resulting from or occasioned by any . . . unskillfulness, negligence or criminal intent above declared, shall forfeit and pay for every person so dying the sum of five thousand dollars, which may be sued for and recovered, . . . if such deceased be a minor and unmarried, . . . by the father and mother, who may join in the suit, . . . or if either of them be dead, then by the survivor."

1. It is obvious that by this instruction the court directed the jury to pass upon issues entirely separate from the question of negligence charged in the petition, and made it possible for the jury to reach a verdict against the plaintiff without taking into consideration any other testimony than that bearing directly upon the questions of misrepresentation as to his age by the ⁴⁸⁹ deceased or his emancipation by the plaintiff. If the jury believed that the plaintiff had in legal effect emancipated his son, and that the deceased had falsely represented himself to the defendant superintendent to be twenty-one years old for the purpose of securing employment, then the plaintiff could not recover, whatever the jury might have found as to the defendant's conduct toward the deceased. The issue of negligence was practically eliminated from the case. That this instruction, in so far as it was predicated upon the emancipation of plaintiff's son by the plaintiff as a defense to this action, was erroneous, was settled by this court in *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164. The right to recover is not made to depend upon services which the deceased could have rendered to his father.

⁴⁹⁷ The deceased was at the time of his death eighteen years and eight months old, and unmarried. The plaintiff is his sole surviving parent. The defendant is a railroad company owning and operating a line of railroad in Wayne county, Missouri. Deceased at the time of his death, and for two weeks prior thereto, was in the employ of the defendant company as a brakeman on a log train running out to the woods from Greenville. While at his post of duty on said train on the twenty-fourth day of April, 1901, he was killed, and this action is instituted for the damages arising to his father from his death.

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As said by Judge Black in the Philpott case, the statute, as well as being compensatory, is also of a penal and police nature: *King v. Missouri Pac. Ry. Co.*, 98 Mo., 235, 11 S. W. 563.

Did the misrepresentation that the plaintiff's son was twenty-one years old bar the father's action? The established rule in this state is that the act under which this suit is brought was designed to transmit a right of action which but for the section would have ceased to exist or would have died with the person; that is, when a person dies from one of the acts defined in the statute which would have entitled such person to sue had he lived, such cause of action may be maintained by certain representatives of the deceased notwithstanding the death of the party receiving the injury: *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112. The right to bring an action of this sort is founded upon the relation of parent and child, and not that of master and servant. It is the right of the father in this case to recover damages which his son might have recovered had he survived the injury: *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 68 Am. St. Rep. 554, 46 S. W. 966, 41 L. R. A. 385. The large question, then, involved in this proposition is, Would the plaintiff's son have been barred from recovery had ⁵⁰⁰ he survived the accident; in other words, will the fact that a minor applicant for employment untruthfully represents himself to be of age in order to secure employment and such representation is believed by his employer, bar him from recovering from any and all injuries which his employer negligently may inflict upon him? Will the employer be heard in a court of justice to say that his negligence only injured the boy when he thought he was injuring a man? It may be conceded, for the sake of argument, that the boy, owing to his representation that he is a man, is only entitled to a man's protection and not to the higher duty which his employer would owe to a minor, but surely it cannot be said that the boy, despite his misrepresentation, is not entitled to some protection. Upon what principle can it be said that if the master, on account of his negligence, would be liable to his servant if he was a man, he should entirely escape all liability because his servant was only a boy, and had represented himself to be a man? If the defendant had no right negligently to kill a man, certainly it had no right to kill a boy by the same negligence because it believed him to be a man. But the contention is that if the plaintiff's son

had been an adult, the statute would give no right to the plaintiff, his father, to recover, and owing to the misrepresentation, the plaintiff is estopped from asserting that his son was a minor. Bluntly stated, then, this contention would amount to this: if the defendant had known that plaintiff's son was a minor, it would not have employed him, because it could not then have negligently killed him without being liable over to his parent.

The exemption claimed rests only on a plea of estoppel. To constitute an estoppel in pais there must be, first, a representation inconsistent with the evidence proposed to be given or the claim offered to be set up; second, action by the other party upon such statement; third, an injury to the party acting upon the representation ⁵⁰¹ by allowing the representation to be disproved. All that the misrepresentation of the deceased led defendant to do was to employ him as a servant. It is not asserted that the boy in any way did not faithfully perform his contractual duties. No breach of his contract is involved in this case. It is an action of tort. At common law, "even the fact that the other party was induced to enter into the contract by the infant's misrepresentation that he was of age would not estop the infant from afterward repudiating it, though he might be liable in tort for his fraud": 16 Am. & Eng. Ency. of Law, 2d ed., 291, 292. Conceding that defendant would not have employed plaintiff's son if he had not misrepresented his age, and that it acted upon his representation and employed him and put him to work as an adult, still this will not meet the contention of defendant or justify the instruction, because defendant can only assert that, relying upon the minor's misrepresentation, it proceeded to do some act which was lawful for it to do, not that it proceeded negligently to kill the boy, as it would have no right to kill a man servant negligently. Moreover, this is the father's action, and he did nothing to estop him.

We are of opinion that the instruction was bad on both propositions—that of emancipation and of misrepresentation. Neither affords defendant any exemption for the negligence alleged if it was guilty of it. It follows that the giving of this instruction was an error for which the judgment must be and is reversed.

The defendant's brief is devoted almost wholly, if not entirely so, to the insufficiency of the plaintiff's abstract. We

ruled on those matters orally. We repeat that the only objection made by defendant to the abstract in the first instance was the failure to index it. Plaintiff supplied that before the motion was heard and that motion was overruled. Plaintiff, then, of his own motion supplied other defects. The subsequent assaults on the abstract were wholly out of time, and we ⁵⁰² see no reason for changing our rulings on the sufficiency of the abstract, though we in no manner approve of the style of it.

Judgment reversed and cause remanded.

Burgess, P. J., and Fox, J., concur.

The Emancipation of Infants is the subject of a recent note to Vance v. Calhoun, 113 Am. St. Rep. 113.

The Effect of an Infant Misrepresenting his Age on his right to avoid his contract on the ground of infancy is considered in the note to Craig v. Van Bebber, 18 Am. St. Rep. 633.

One Who Employs a Minor, knowing him to be such, in a dangerous business, without the father's consent, becomes liable to compensate the father for any loss of the son's services during minority, which may result from an injury suffered in that business; and no question of contributory negligence, or as to whether the injury resulted from the negligence of the minor's fellow-servants, can arise in such case: Texas etc. Ry. Co. v. Brick, 83 Tex. 526, 29 Am. St. Rep. 675.

KLAUBER v. SCHLOSS.

[198 Mo. 502, 95 S. W. 930.]

FRAUDULENT CONVEYANCES—Solvency of Vendor.—If a transfer of property is made with intent to hinder or delay creditors, it is fraudulent as to them, whether or not the vendor is insolvent at the time of the transfer. (p. 493.)

FRAUDULENT CONVEYANCES—Fraudulent Vendee.—If a deed of trust is given to secure a pretended debt, to the knowledge of the vendee, he, by accepting the provisions of the deed, becomes a party to the fraud. (p. 493.)

FRAUDULENT CONVEYANCES—Consideration.—If a deed of trust is made with actual intent to hinder, delay or defraud creditors, and the cestui que trust knows of the purpose for which the transfer is made and is a party thereto, the deed is void as to such creditors of the vendor, regardless of the consideration for such deed, whether adequate or inadequate. (p. 493.)

FRAUD—Presumption—Proof.—While fraud is never presumed and must be proved, it is not necessary that it be proved by direct evidence, and it may be shown by sufficient facts and circumstances connected with and surrounding the transaction. (p. 493.)

FRAUDULENT CONVEYANCES—Fictitious Consideration.—
If part of the consideration for a conveyance of property is fraudulent or fictitious, the entire transaction is fraudulent as against creditors, and will be set aside. (p. 494.)

C. F. Schneider, for the appellants.

L. W. Grant and P. B. Kennedy, for the respondent.

505 BURGESS, P. J. On the twenty-fourth day of December, 1902, there was filed in the office of the clerk of the circuit court of the city of St. Louis a petition by plaintiff, which, leaving off the formal parts, is as follows:

"Plaintiff for cause of action states that heretofore, to wit, on or about the ninth day of November, 1899, he signed and executed as surety for Stephen Schloss, defendant, a certain appeal bond in an appeal from a judgment rendered against said Stephen Schloss by Frederick A. Cline, a justice of the peace in and for the ninth district of the city of St. Louis, Missouri; that by reason of said contract of suretyship plaintiff was compelled to pay, and did pay, said judgment and costs, all amounting to \$227, for which said amount he recovered judgment against the said Stephen Schloss, on or about the tenth day of May, 1902, in the justice court in and for the fifth justice district of the city of St. Louis, Missouri, before James T. Spaulding, justice.

"Plaintiff further states that heretofore, to wit, on or about the twenty-seventh day of January, 1896, defendant **506** Schloss was the owner in fee simple of the following described real estate, situated in the city of St. Louis, Missouri, to wit: A lot of ground in block 38, beginning at the intersection of the north line of Valentine street with the west line of a public alley running north and south through said block; thence north along the west line of said alley 86 feet; thence west and parallel with Valentine street 42 feet 6 inches to the east line of a private alley, thence south along the east line of said private alley 86 feet to the north line of Valentine street; thence east along the north line of Valentine street 42 feet 6 inches to place of beginning, together with all buildings, appurtenances, etc.

"That on or about the said twenty-seventh day of January, 1896, the said Stephen Schloss conveyed said property as hereinbefore described to defendant August Gehner, in trust, to secure an indebtedness of \$1,300, to one Frank Hiemenz;

that thereafter, to wit, on or about the sixteenth day of July, 1901, said Stephen Schloss executed a second deed of trust to the Missouri Trust Company, to secure an alleged indebtedness of \$5,000 to defendant Veronicka Braske.

"Plaintiff further states that on or about the eighteenth day of September, 1902, defendant August Gehner, acting under and by virtue of said first deed of trust, sold the said property at public sale and said property was bid in by defendant Veronicka Braske for the sum of \$3,800; that said Veronicka Braske has failed and refused, and still refuses, to complete said sale by paying the full sum of \$3,800 to said August Gehner, unless she can get credit for the amount of the surplus of said \$3,800 over and above so much as may be required to pay off the indebtedness of \$1,300 on said first deed of trust, together with such costs and interest as may have accrued, on her second deed of trust.

"Plaintiff further alleges that said second deed of trust on said property hereinbefore described, executed to secure an alleged indebtedness to defendant ⁵⁰⁷ Veronicka Braske, was fraudulent and without consideration and given by defendant Schloss for the purpose of avoiding liability on said judgments of Justice Cline and the appeal bond executed therein, and for the purpose of defrauding the plaintiff in that said case, to wit, the Drayage Transfer Company, and defeat the payment of said judgment by him, and for the further purpose of defrauding this plaintiff by compelling him to pay the said judgment of Justice Cline against said Schloss.

"Plaintiff further states that both defendant Schloss and Veronicka Braske are insolvent; that he is without remedy at law, and except by the interposition of a court of equity he must remain totally remediless in the premises and his said judgment must remain wholly unpaid.

"Wherefore, plaintiff prays for a decree directing that in the event that defendant Veronicka Braske completes said sale and pays said Gehner said sum of \$3,800, said Gehner be required, after paying such amount as may be required to discharge the indebtedness of said first deed of trust and expenses of the sale, to pay into court so much of the surplus as may be necessary to pay plaintiff's judgment and costs, as well as the costs of this suit, or, should said Veronicka Braske fail to complete said sale and pay said sum of \$3,800 to trustee

August Gehner, then plaintiff prays for a decree declaring said second deed of trust inoperative and void as fraudulent and without consideration, and for an order that said property be sold by order of this court, subject to the first deed of trust and the proceeds of said sale, or so much thereof as may be necessary to be applied to the payment of plaintiff's said judgment and costs, as well as the costs of this suit, and such other and further relief as the court may deem meet and just in the premises and the circumstances of the case may require."

⁵⁰⁸ By his amended separate answer defendant Schloss denied generally the allegations of plaintiff's said petition.

The answer of defendant August Gehner is as follows:

"That on or about the twenty-seventh day of January, 1896, the property mentioned, referred to and described in the petition, was conveyed to him, as trustee, to secure an indebtedness of \$1,300 to one Frank Hiemenz, and duly recorded in the office of the recorder of deeds for the city of St. Louis, Missouri.

"Further answering, this defendant denies each and every other allegation in said petition contained."

Defendant Veronicka Braske answered, admitting that on the twenty-seventh day of January, 1896, the property in question was conveyed to her codefendant, August Gehner, in trust, to secure an indebtedness of \$1,300 to one Frank Hiemenz; that thereafter, to wit, on or about the sixteenth day of July, 1901, said property was conveyed to the Missouri Trust Company as trustee, to secure to her the sum of \$5,000, as per negotiable promissory note in said deed of trust mentioned and described. This answer charges that both said deed of trust and the indebtedness secured thereby remain due and unpaid, and are a lien on said property. It then denies all other allegations in the petition.

Upon the hearing of the cause the court made a finding of facts and rendered the following judgment and decree:

"Now upon this nineteenth day of May, A. D. 1903, this cause having come on for hearing on the pleadings and proofs adduced, parties plaintiff and defendant appearing, and the court having been duly advised in the premises, and having duly considered the same, doth find the issues joined in favor of the plaintiff; and the court doth further find that defendant Stephen Schloss is indebted to plaintiff on his said

judgment as alleged in his bill in the sum of \$227.20, and ⁵⁰⁹ costs in said case accrued amounting in all to \$269.40, none of which has been paid, and the court doth further find that said deed of trust executed and recorded by defendant Stephen Schloss, on or about the sixteenth day of July, 1901, to secure a pretended indebtedness of \$5,000 to defendant Veronicka Braske was fraudulent and void as against this plaintiff.

"Whereupon, it is by the court ordered, adjudged and decreed that the said deed of trust executed aforesaid be set aside and for naught held, and the same is hereby declared nugatory and of no effect, and it is further ordered, adjudged and decreed that in the event that the defendant Veronicka Braske fully perform the contract of purchase of said property heretofore made with defendant August Gehner, trustee, by paying the full amount of the purchase price to said defendant Gehner within ten days from the date of the entry of this decree, said Gehner, after satisfying the indebtedness secured by the first deed of trust, together with the costs incident thereto, is hereby directed and ordered to apply the surplus remaining in his hands, first, to the payment of plaintiff's said judgment and costs, together with the costs of this suit, and the remainder of said purchase price, if any there be, to be disposed of by said defendant Gehner as the parties in interest may direct.

"It is further adjudged, ordered and decreed that in the event said defendant Veronicka Braske fails to fully perform the said contract of purchase made with said defendant August Gehner, within ten days from the entry of this decree, then said purchase by Veronicka Braske be and hereby is declared abandoned, forfeited and nugatory, and the sheriff of the city of St. Louis is hereby ordered and directed to sell said property at the courthouse door, in the city of St. Louis, after giving twenty days' notice in some newspaper published in said city, said property to be sold subject to the first deed of trust, executed to defendant Gehner; ⁵¹⁰ and the said sheriff of the city of St. Louis is further ordered and directed to apply the proceeds of said sale to the payment of plaintiff's said judgment and costs, together with the costs of this suit and dispose of the residue of said proceeds as the parties in interest may direct."

In due time defendants filed motions for a new trial and in arrest, and both being overruled, they appeal.

The salient facts as disclosed by the record are substantially as follows:

Sometime in November, 1899, defendant Stephen Schloss was involved in a lawsuit with the Drayage Transfer Company, which suit was tried before a justice of the peace, who rendered judgment against Schloss. He appealed from the judgment, and Klauber, the plaintiff herein, at the request of Schloss, became his surety on the appeal bond required by the justice; but after the appeal was perfected Schloss abandoned the case, the consequence being that Klauber was compelled to make the best settlement he could with the said Drayage Transfer Company. Klauber sued Schloss for the amount paid out by him in the settlement of said suit, and Schloss filed a counterclaim for a certain sum growing out of former business transactions between them, but Klauber recovered judgment against Schloss for \$227 and costs, upon which judgment execution was issued and returned nulla bona.

On July 16, 1901, Schloss executed to defendant Veronicka Braske a deed of trust on certain property on Valentine street, St. Louis, to secure an alleged indebtedness of \$5,000, and this suit is for the purpose of attacking and having declared as fraudulent, as against plaintiff, said deed of trust.

It also appears from the evidence that there was a prior deed of trust for \$1,300 on said property, and that the property was worth approximately \$3,500 or \$4,000. The testimony of defendant Braske was very ⁵¹¹ vague and indefinite with respect to what Schloss owed her. In fact, she could not fix any amount, saying that she gave Schloss, at different times, \$50, \$75, \$25, and \$100; total, \$250. She still said she gave him "over \$900," but that she made no memorandum of it and kept no record, but relied upon the deed of trust as security. Testifying further, she said that the understanding was that she was to get the property ultimately, and would not be required to account to Schloss for any sum; that she kept no account whatever, could not tell what amounts had been loaned, and that if it came to a settlement between them, she would have no record of what was due her. It appears further in the evidence that Schloss had been using this prop-

erty so as to secure credit on an apparent asset, and when he wished to avoid liability he transferred or mortgaged it. In 1882 he conveyed the property to his wife, and they subsequently executed a deed of trust thereon to defendant Gehner. His wife having died, he then executed a deed of trust on the property to secure the \$5,000 indebtedness alleged to be due defendant Braske.

It also appears that Schloss at divers times stated that the property was his, and that he could get it back at any time; that the deed of trust was only a matter of form, and that he had executed it to keep the man Henzler (president of the drayage company) from getting anything from him; that the note was signed to keep people from running after him, but that the property was his own. Defendant Schloss was in the scrap-iron business at No. 117 Valentine street, and he and defendant Braske lived at that place, and, according to Braske's story, she kept the store for him, and he was to pay her \$10 per week. She testified that she had \$1,500, which she had received from the old country; that she had sold a store in Chicago and got about \$1,200; but when closely examined, she could not tell how much she had given Schloss; and it appears, also, that she ⁵¹² ran the business, and when she sold anything from the store she kept the money, and when he sold anything he kept the money, and they put it together at the end of the day, and she would take it to her room upstairs.

The evidence of defendant Schloss bore principally upon his alleged claim against Klauber through a dispute in the sale of some iron. The evidence of witness Jacob was to the effect that Schloss had said a number of times that the property was his; that he simply put it in the name of defendant Braske to keep the drayage company and other parties from running after him; that he could get the property back whenever he wanted it, and that he promised a number of times to begin paying Klauber the money he owed him. Witness Klauber testified to much the same thing, and witness Girardi corroborated both of them relative to this statement of Schloss.

It is claimed by defendant that the petition does not state a cause of action, in that it does not allege that defendant Schloss, at the time the deed of trust was given to defendant Braske, was insolvent, nor that Braske procured said deed of trust by fraud on her part. It was ruled by this court in

Rupe v. Alkire, 77 Mo. 641, that if a sale of property be made with the intent either to hinder or delay creditors, it is fraudulent as to them, whether the vendor be solvent at the time of such sale or not. With respect to the other contention, it is only necessary to call attention to the allegations of the petition, which substantially allege that the deed of trust executed for the benefit of defendant Braske was executed for the purpose and with the intent to defraud the creditors of Schloss.

The court found that the deed of trust given by Schloss was given to secure a pretended indebtedness of \$5,000 to defendant Braske, and was fraudulent and void as against the plaintiff. There was evidence which justified that finding. The debt being pretended and not bona fide, she, of course, knew it, and by accepting ⁵¹³ the provisions of the deed, she became a party to the fraud. In passing upon this question, it will be noted that Schloss and Braske lived in the same building, and practically operated the store together, the proceeds of each day's sales being taken charge of by her. According to her own testimony, she never received a dollar from Schloss on account of salary or her alleged loan. Under the facts disclosed by the evidence, there can be no conclusion other than that the deed of trust under consideration was made with the actual intent on the part of Schloss to hinder, delay or defraud his creditors, and especially this plaintiff, and that Braske knew all about the transaction, and was a party thereto. Such being the case, the deed is void as to said creditors, and it makes no difference what the consideration really was, or whether it was adequate or not.

While fraud is never to be presumed, it is not necessary that it be proved by direct testimony, but may be shown by facts and circumstances, if sufficient; and the facts and circumstances connected with and surrounding the transaction may be inquired into and taken into consideration by the court in passing upon the question as to whether the transaction was in fact fraudulent.

At the time the deed of trust was executed defendant Braske had worked for Schloss six or seven months, at \$10 per week, the wages thus earned amounting to about \$280, while the deed of trust was given to secure a pretended indebtedness of \$5,000. But conceding that Schloss owed her \$280 for labor, as well as the various sums which she claims in her

evidence to have loaned him at different times, and of which she kept no memorandum, the whole falls far short of \$5,000. Her story with respect to Schloss' indebtedness to her, the manner in which it accrued, and the amounts and times, seems so improbable that it is not entitled to much consideration. Moreover, it is clear from the evidence that ⁵¹⁴ at least part of the claim attempted to be secured by the deed of trust under consideration was fictitious, as Schloss' indebtedness to Braske at no time approximated \$5,000, and it is well settled that if a part of the consideration for a conveyance of property is fraudulent or fictitious, the entire transaction is fraudulent as against creditors, and will be vitiated: *State v. Hope*, 102 Mo. 410, 14 S. W. 985; *National Tube Works Co. v. Ring etc. Machine Co.*, 118 Mo. 365, 22 S. W. 947; *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524; *Gleitz v. Schuster*, 168 Mo. 298, 90 Am. St. Rep. 461, 67 S. W. 561; *First Nat. Bank v. Fry*, 168 Mo. 492, 68 S. W. 348; *Imhoff v. McArthur*, 146 Mo. 371, 48 S. W. 456; *Bates County Bank v. Gailey*, 177 Mo. 181, 75 S. W. 646.

Finding no reversible error in the record, the judgment is affirmed.

All concur.

When a Person Purchases Property from a Debtor in failing circumstances, three things must usually concur to protect his title: 1. He must buy without notice of the fraudulent intent on the part of the vendor; 2. He must be a purchaser for a valuable consideration; and 3. He must pay the purchase money without knowledge of the fraud: See the note to *State v. Mason*, 34 Am. St. Rep. 395.

If a Deed is in Fraud of a Judgment Creditor of the grantor, and both he and the grantee participate in the fraud, the grantee, as against the judgment creditor, is not entitled to protection to the extent of the consideration paid for the property: *Biggins v. Lambert*, 213 Ill. 625, 104 Am. St. Rep. 238. And if children who receive a conveyance from their father for an alleged debt are conscious that a portion of the debt is fictitious, they are chargeable with the fraudulent purpose of their father, and the whole transaction is void as to creditors: *Gleitz v. Schuster*, 168 Mo. 298, 90 Am. St. Rep. 461.

O'CONNOR v. ST. LOUIS TRANSIT COMPANY.

[198 Mo. 622, 97 S. W. 150.]

CONSTITUTIONAL LAW—Subject and Title of Statutes.—If all the provisions of a statute fairly relate to the same subject, have a natural connection with it, and are the incidents or means of accomplishing it, the subject is then single, and, if sufficiently expressed in the title, the statute is valid. (p. 498.)

CONSTITUTIONAL LAW—Subject and Title of Statutes.—A statute entitled, "An act to prevent frauds between attorneys, clients, and defendants; making agreements between attorney and client a lien upon the cause of action," and providing for an attorney's lien upon his client's cause of action, stating the nature and character of the contract authorized to be entered into between attorney and client and made the basis of the lien, providing for notice and other incidents for making such lien effective, and that defendant who ignores such notice and lien and settles with the client without the attorney's consent shall be liable to such attorney for his interest in the litigation according to the contract, contains no provisions which do not clearly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, clearly germane to subject expressed in the title, and such statute is constitutional and valid. (p. 499.)

CONSTITUTIONAL LAW—Title of Statutes.—A statute cannot be declared unconstitutional for the reason that it fails to clearly express the subject by its title, unless it clearly violates that command of the constitution, and the mere generality of the title will not vitiate the statute unless such title is of such nature as to compel a conviction that it was designed to mislead as to the subject dealt with. (p. 503.)

CONSTITUTIONAL LAW—Special Laws—Class Legislation.—A statute undertaking to cover a certain class of persons engaged in a particular profession, as attorneys at law, but which does not undertake to select any particular person in that class, and applies to all alike who fall within such class, is not unconstitutional as special or class legislation. (p. 504.)

CONSTITUTIONAL LAW—Attorneys' Liens—Right to Contract.—Statute simply creating a lien upon causes of action in favor of attorneys at law, and requiring defendants in actions, after due notice of such lien, to respect it, is not unconstitutional as restricting or destroying the defendant's right to contract. (p. 505.)

ATTORNEYS' LIENS—Action to Enforce.—A statute creating a lien upon causes of action in favor of attorneys at law, and requiring defendants in such actions after due notice of such lien, to respect it, does not deprive a defendant of the right to settle his suit, but it does require him, in making such settlement, to take into consideration the existence of such lien, and if he ignores it and settles the suit without the consent of the attorney, he is liable in a separate action at law brought by such attorney, for the amount of such lien. (p. 506.)

APPELLATE PRACTICE—Exceptions—Finding of Facts.—If the bill of exceptions on an appeal, or abstract of record in lieu thereof, discloses no objections or exceptions to the failure of the trial court to make a finding of facts, the trial court was not in error in failure to make such finding, especially when it is admitted by the appellant that there was no dispute about the facts. (p. 508.)

G. W. Easley and Boyle & Priest, for the appellant.

J. B. Dempsey, for the respondent.

630 FOX, J. This cause is brought to this court by appeal from a judgment of the circuit court of St. Louis in favor of the plaintiff and against the defendant for forty-one dollars and sixty-six cents.

This action was commenced before a justice of the peace of the city of St. Louis. The statement, filed by plaintiff before the justice, alleged that he was an attorney and counselor at law; that defendant was a corporation, operating a street railway, and that on or about the thirtieth day of June, 1902, one Emma French sustained injuries to her person while alighting from one of defendant's cars, which she alleged to be due to the negligence of defendant's servants in charge of said car, whereby she became the "possessor of a subsisting claim and cause of action for ten thousand dollars damages." That thereafter, on the eighth day of August, 1902, said Emma French entered into a written contract with this plaintiff, employing and instructing him to enter and prosecute an action in her favor for said ten thousand dollars damages against defendant, and that Mrs. French agreed that plaintiff should receive for his services for entering and prosecuting said action one-third of all of any sum of money that should be recovered in said suit, or by or through any compromise of said suit, without regard to the time at which said compromise should be made. That on the ninth day of August, 1902, plaintiff entered an action at law in favor of said Mrs. French on her alleged cause of action. That thereafter, on the third day of November, 1902, plaintiff served notice in writing of said contract of employment by Mrs. French, and that said action had been instituted in the circuit
631 court of St. Louis, Missouri, also showing the proportion of the recovery that plaintiff was to receive, either by suit or compromise of the same; and further alleged that, on the twenty-fifth day of November, 1902, Mrs. French and the defendant herein, without the knowledge or consent of this plaintiff, compromised said action, and the said claim on which said action was based for the sum of one hundred and twenty-five dollars, which sum was paid to Mrs. French by the defendant, and said Emma French then and there entered

into a stipulation for the dismissal of said cause at her costs, which said stipulation defendant filed in said court, and the prosecution of said cause was dismissed, whereby plaintiff has been deprived of his fee; the insolvency of Emma French is alleged and judgment is prayed under the act of February 25, 1901. A suit was brought for the recovery of the sum of forty-one dollars and sixty-six cents. The trial before the justice resulted in a judgment for forty-one dollars and sixty-six cents in favor of the plaintiff, from which judgment the defendant appealed by filing an affidavit and bond within the time required, and the cause was tried de novo in the circuit court on May 5, 1903.

There is no necessity for reproducing the evidence introduced at the trial of this cause in the circuit court, for appellant admits in its brief that the evidence preserved in the bill of exceptions substantially sustains the averments of the plaintiff's statement of this case, and there are no disputed facts in the case.

Upon the submission of the cause to the court there was a finding and judgment for the plaintiff in the sum of forty-one dollars and sixty-six cents. Motions for new trial and in arrest of judgment were timely filed and were by the court overruled. From this judgment defendant prosecuted its appeal to this court, and the record is now before us for consideration.

It is apparent from the record in this cause that the trial court made the order granting the appeal to this court, for the reason that defendant challenges the constitutionality of the act upon which this proceeding is predicated. The contentions of appellant upon this constitutional question may thus be briefly stated:

1. That the act of February 25, 1901, upon which this action is based, is unconstitutional and void because in contravention of article 4, section 28, of the constitution of Missouri, which substantially provides that no act shall contain more than one subject, which shall be clearly expressed in the title.

2. It is insisted that said act of February 25, 1901, is contrary to, and violative of, the provisions of article 2, section 30 of the constitution of this state, which provides that no person shall be deprived of life, liberty or property without due process of law.

3. It is urged that this act is unconstitutional and void for the reason that it is in contravention of article 2, section 20 of the constitution of Missouri, which substantially provides that "no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

4. It is contended by appellant that the act of February 25, 1901, is unconstitutional and void for the reason that it contravenes the provisions of section 1 ⁶³³ of the fourteenth amendment of the constitution of the United States.

This act of February 25, 1901, the constitutionality of which is challenged by appellant, was senate bill No. 9, head-notes, "Attorneys at Law: Lien Upon Cause of Action," followed by the following title: "An act to prevent frauds between attorneys, clients and defendants; making agreements between attorney and client a lien upon the cause of action."

There is no subject that has more frequently had the attention of this court than the one in which acts of the General Assembly have been challenged for failure to conform its legislation to requirements of section 28, article 4 of the constitution of this state, which substantially provides that no bill shall contain more than one subject, which shall be clearly expressed in its title. We deem it unnecessary, however, to review the numerous cases upon this subject, but shall be content with a brief reference to the rules to be deduced from the adjudications as to the objects and purposes sought by the framers of the constitution in the enactment of such constitutional provisions.

It has been repeatedly stated by this court that the objects and purposes of this constitutional provision were to prevent incongruous, disconnected matters, which had no relation to each other, from being joined in one bill; however, it has always been recognized that all matters that are germane to the principal subject and have a natural connection with it, might properly be incorporated in the same bill. In *Ewing*

v. Hoblitzelle, 85 Mo. 64, it was ruled: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, . . . and if it is sufficiently expressed in the title, the statute is valid." This rule was approved by Judge Black, in *State ex rel. Attorney General v. Miller*, 100 Mo. 439, 13 S. W. 677, ⁶³⁴ citing in support of such approval, *St. Louis v. Tiefel*, 42 Mo. 578, *State v. Mathews*, 44 Mo. 523, *State v. Miller*, 45 Mo. 495, *Hannibal v. County of Marion*, 69 Mo. 571, and *State v. Mead*, 71 Mo. 268, as substantially announcing the same rule as approved in *Ewing v. Hoblitzelle*, 85 Mo. 64. To the same effect is *State v. Bronson*, 115 Mo. 271, 21 S. W. 1125, where it was ruled that this section of the constitution should be reasonably and liberally construed and applied, due regard being had to its object and purpose. It was again announced in that case that if all the provisions of the bill have a natural relation and connection, then the subject was single, and this, too, though the bill contains many provisions. In *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, the rule announced in the foregoing cases was approved and followed.

It is insisted by appellant that this act embraces more than one subject, and is therefore violative of the constitutional provisions now being discussed. We are unable to give our assent to this contention. It is clear that the subject of this act was the making of agreements between attorney and client a lien upon the cause of action, and the purpose of it was to prevent frauds between attorneys, clients and defendants. The contention upon this proposition is thus stated in the brief by learned counsel for appellant:

"The attorney's lien act embraces four separate and distinct subjects, to wit:

"1. The subject of giving an attorney a lien upon his client's cause of action or counterclaim, which lien attaches to a verdict, report, decision or judgment in his client's favor.

"2. The object of making it 'lawful for an attorney at law, either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered by him for a ⁶³⁵ certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action.'

"3. The subject or object of making notice in writing to the opposite party that such legalized contract has been made, which notice creates a lien upon the claim or cause of action and upon the proceeds of any settlement thereof.

"4. The subject of making defendant liable for in any manner settling any claim or suit after notice is served, without written consent of the attorney."

To fully appreciate this proposition it is well to know what are the provisions of the act to which the contentions of appellant are directed. It provides:

"Section 1. The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the services of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be (effected) [affected] by any settlement between the parties before or after judgment.

"Sec. 2. In all suits in equity and in all actions or proposed actions at law, whether arising ex contractu or ex delicto, it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, ^{or} proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service(s) of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed de-

fendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided, between such attorney and his client": Laws 1901, p. 46.

A careful analysis of the foregoing provisions makes it manifest that the matters therein contained have a legitimate connection and relation to each other, and are clearly germane to the subject expressed in the title, of making agreements between attorney and client a lien upon the cause of action. The first section provides for the attorney's lien upon his client's cause of action or counterclaim. That section is clearly in harmony with the subject as expressed in the title. Section 2 provides the nature and character of the contract which the attorney is authorized to enter into with his client in all suits in equity and in all actions of proposed actions at law, whether arising ex contractu or ex delicto. This is clearly germane to the subject as expressed in the title, for the reason that ⁶³⁷ it deals with the agreement between the attorney and the client, which is to be made a lien upon the cause of action. Then follows the provision which must be treated as the incidents and means of accomplishing the purpose of the legislation—that is, the giving of the defendant notice of the agreement between the attorney and client, stating therein the interest the attorney has in such claim or cause of action, with the view that the defendant might regulate his dealing with the plaintiff, so far as adjusting or settling that cause of action, accordingly. Then follows the particular provision upon which the cause of action in the case at bar was predicated, that if any defendant or defendants, or proposed defendant or defendants, shall, after notice served as herein provided, in any manner settle any claim, suit, cause of action or action at law, with such attorney's client, before or after litigation instituted therein, without first procuring the written consent of such attorney, he or they shall be liable to such attorney for such attorney's lien as is provided by this act.

We think it is clear that all of the provisions of this act clearly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, and without the provision requiring defendants, after due service of notice, in lawsuits or contemplated lawsuits, from respecting the agreements between attorneys and clients, this legislation in behalf of the lawyers of this state would be of little avail in protecting them in respect to their lien upon the cause of action, as contemplated by this act.

It is also insisted that the title to this act does not sufficiently clearly express the subject as to meet the requirements of the constitutional provisions. In discussing this provision of the constitution applicable to this subject, this court, in *State v. Ranson*, 73 Mo. 78, said that "the adjudicated cases, as well ^{as} as the elementary writers, all concur that it was to prevent the vicious practice of conjoining, in the same bill, incongruous matters, and subjects having no legitimate connection or relation to each other, and in no way germane to the subject expressed in its title; that its object was to prevent surprise or fraud upon members of the legislature, rather than embarrass legislation by making laws unnecessarily restrictive: *Cooley on Constitutional Limitations*, 174; *St. Louis v. Tiefel*, 42 Mo. 578. Some of the adjudicated cases have construed this provision with some strictness, but in the majority of them the rule is otherwise. In the case of *State v. Miller*, 45 Mo. 495, this court uses this language: 'The courts, in all the states where a like or similar provision exists, have given it a very liberal interpretation, and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law.' Justice Cooley, in his work on *Constitutional Limitations*, page 178, says: 'There has been a general disposition to construe the constitutional provisions liberally, rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted.' The supreme court of Louisiana, in commenting on argument of counsel, which demanded a strict construction of a constitutional clause like this, uses this language: 'We think the argument invokes an interpretation of the constitutional clause too rigorous and technical. If, in applying it, we should follow the rules of a nice and fastidious verbal criticism, we

should often frustrate the action of the legislature without fulfilling the intention of the framers of the constitution': Succession of Lanzetti, 9 La. Ann. 329."

This court very clearly pointed out the rule which should be applied in the determination of the sufficiency ⁶³⁹ of the expression of the subject in the title of the bill in *State v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; it was ruled that the mere generality of the title will not vitiate an act of the General Assembly unless the title is of such a nature as to compel a conviction that it was designed to mislead as to the subject dealt with. It is clearly the province of the law-making power to decide upon the title of an act, and at least some deference must be paid to their decision, and an act should not be declared unconstitutional for the reason that it fails to clearly express the subject by its title, unless it clearly violates that command of the constitution: *Dogge v. State*, 17 Neb. 140, 22 N. W. 348.

Applying the rule announced in the foregoing cases to this proposition, we are of the opinion that the subject of the act was sufficiently expressed in its title, and that the provisions of it are germane to the principal subject, and have a natural connection with it, and we discover nothing, either in the title or in the provisions of the act, which were calculated to surprise or operate a fraud upon any of the members of the law-making power.

Nor is this act open to the charge of contravening other provisions of the constitution indicated by appellants in its brief. It is clearly not class legislation, as insisted by learned counsel for appellant, on the ground that it simply applies to attorneys at law. The distinction between general and special laws has been very clearly drawn by numerous cases in this state. The rule upon this subject as announced by the supreme court of Pennsylvania in *Wheeler v. Philadelphia*, 77 Pa. 338, has repeatedly met the approval of this court. It is there held "that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." And it was said by this court in *State v. Tolle*, ⁶⁴⁰ 71 Mo. 645, that the classification spoken of by the supreme court of Pennsylvania does not depend upon numbers: *McAunich v. Mississippi etc. Ry. Co.*, 20 Iowa, 338, and *State v. Parsons*, 40 N. J. L. 1. This distinction was followed and approved

in *State v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430, 67 S. W. 592; *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232, 56 S. W. 1091; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State v. Herrmann*, 75 Mo. 340; *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

This act undertakes to cover a certain class of persons engaged in a particular profession. It does not undertake to select any particular person in that class, but applies to all alike who fall within the class of attorneys at law.

The history of legislation in this state demonstrates that the law-making power found it essential, for the purposes of legislation, to divide both persons and business in separate classes, and it is now no longer an open question in the courts of this state that legislation applicable to a particular class is not violative of the constitutional provision which prohibits the enactment of special laws. That lawyers in this state belong to a particular class we think there can be no dispute, and we can see no reason, even though they be only lawyers, why legislation which deals in a general way with the affairs of that class, should be held unconstitutional. We have legislation in this state respecting other classes of persons, such as fellow-servants, mechanics, landlords, bankers, insurance laws and other legislation which have reference to only one line of trade or class of persons; yet, wherever these laws have been in judgment before the courts of this state, they have been held constitutional and valid: *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Hennig v. Staed*, 138 Mo. 430, 40 S. W. 95.

The object and purpose of this act, the validity of ⁶⁴¹ which is challenged by appellant, was to provide a lien in favor of attorneys at law upon the cause of action, and we have repeatedly recognized the justness, as well as the constitutionality, of the lien provided for the mechanic and the landlord on crops made by his tenant, and we are unwilling to say that a lien provided for the legal profession should be ignored and held unconstitutional. While the business of these classes may be essentially different, we are unable to assign any legal valid reason why a distinction should be made against the legal profession. This act in no way deprives the defendant or anyone else of his rights without due process of law, and in view of the full discussion of that subject and the settled

rules that have been made construing that part of the federal constitution, we deem it unnecessary to further discuss that proposition: *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660; *State v. Addington*, 77 Mo. 110; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231, 32 L. ed. 623; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. ed. 463; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. ed. 107.

It is insisted by appellant that this act restricts or destroys the defendant's right to contract. We are unable to give our assent to this insistence. The provisions of this act simply create a lien upon the cause of action in favor of the attorney at law, and requires the defendant, after due notice, which creates such lien in dealing with the party as to such cause of action, that such lien shall be respected. If we are dealing with the owner of a horse, and have notice that there is a valid subsisting lien upon the horse, we would not contend for a moment that such lien could be ignored. So it is in respect to other property—in dealing with the owner of it, if we have notice of the existence of a lien, such lien cannot be ignored. Is there any difference, if a defendant has notice of the existence of a ⁶⁴² lien of an attorney upon a cause of action and the instances above cited? We think not. This law does not deprive a defendant of any of his rights. When the lien is created, in dealing with the plaintiff in respect to such cause of action he must act accordingly. It does not deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and if such lien is ignored, he will be required to account to him in an action at law for the amount of such lien.

This act is vigorously assailed by learned counsel for appellant on the ground that it tends to lead to the commission of unprofessional acts on the part of attorneys. This may be true in some instances, but the profession of law, when practiced upon a high plane, is an honorable one, and by no means should an act of the General Assembly, presumably enacted for the benefit of the honorable practicing lawyers of the state, be declared invalid for the reason that instances may arise by reason of the law which enable some of the less reputable attorneys to do acts which are not com-

mendable along professional lines. In our opinion this law is constitutional and valid.

This brings us to the consideration of the only remaining proposition urged by counsel for appellant; that is, that plaintiff was not entitled to recover under the facts in this case.

It is first insisted by appellant that this action is for the enforcement of the lien, and that the justice of the peace had no jurisdiction. It will be observed that this action is not strictly to enforce the lien provided by the statute, but is to recover the amount of such lien by reason of the failure of the defendant to recognize the lien in its settlement with the plaintiff. This cause of action is expressly provided for by the terms of the statute. This same proposition was involved in *Yonge* ⁶⁴³ v. *St. Louis T. Co.*, 109 Mo. App. 235, 84 S. W. 184. Goode, J., speaking for the court in that case, thus very clearly and correctly stated the law applicable to it. He said: "The second proposition which the defendant invokes is that Yonge should have sought to proceed with the case of *Mrs. Hagan* against the *Transit and United Railways Companies*, notwithstanding the settlement; should have interposed against the dismissal of that suit, and carried it forward to a judgment for the amount of his demand. The statute in hand says in plain words that a defendant who settles with an attorney under the circumstances given shall be liable to the attorney for that percentage of the proceeds which his contract with his client entitles him to receive. An express statutory liability of a legal character was thereby created, and as no particular or exclusive remedy was provided for its enforcement, it is enforceable by the usual common-law remedy; that is, by an action at law corresponding to trespass on the case: *Sedgwick on Statutory and Constitutional Law*, 2d ed., p. 74 et seq., and the cases cited in the footnotes. The construction contended for by the defendants is clearly inadmissible in view of the provisions that if a settlement occurs before an action is begun on the claim, the defendant is nevertheless liable. Of course, in such an instance, the attorney cannot go on with the prosecution of a suit in the name of his client, because there will be no suit pending for him to carry forward. In that contingency, unquestionably, an independent action can be instituted in his own name; and we discern nothing in the language of the

statute which discriminates that contingency from one like the present, for the purpose of compelling the adoption of different procedures in two cases. So far as the enforcement of this lien is concerned, it strikes us as resembling the statutory lien on crops, which a landlord may make effective by suing one who purchases the crops on demised premises from the tenant ⁶⁴⁴ with knowledge of the landlord's lien." Referring to the purposes of the provisions of this act, the court during the course of the opinion stated that "they indicate a purpose on the part of the legislature to prevent a defendant, actual or potential, in an action sounding either in contract or tort, from settling with the claimant so as to cut out the claimant's attorney from a contingent compensation to which the attorney is entitled under a contract. We see no reason why Yonge was not within the protection of this statute. He had a contract with Mrs. Hagan which stated definitely what percentage of any sum collected under it, with or without suit, should be his. The defendants had notice of that contract and settled with Mrs. Hagan in disregard of it. According to the plain language of the statute, they could only make a settlement with her which would be binding on Yonge and exonerate them from liability to him by first obtaining his written consent. The statute says, in effect, that if a settlement was made without his written consent, as it was, the companies are liable to him for his portion of the proceeds."

In *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701, the St. Louis court of appeals very clearly pointed out the nature and character of the cause of action under the provisions of this statute. Bland, J., speaking for the court in that case, said: "Under the provision of the first section of the act, the lien of an attorney attaches when the suit is commenced or service of an answer containing a counterclaim is made. If the attorney and client enter into a contract that the former shall receive as compensation for his services a percentage of the amount recovered or realized, and the attorney serves a written notice on the defendant or proposed defendant of the agreement between himself and client, the lien attaches to the matter or cause of action from the date of the service of such notice, although no suit ⁶⁴⁵ has been commenced, and if the claim is settled by the client with the defendant or proposed defendant, in disregard of the attorney's rights, after

the defendant has been served with such notice, he will be individually liable to the attorney, as per his contract with his client."

The cause of action set forth in the statement before the justice of the peace brought it clearly within the provisions of the statute, and the amount sued for was within the jurisdiction of the justice, and the justice had jurisdiction to try and determine the cause.

We deem it unnecessary to pursue this subject further. The cases of *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701, and *Yonge v. St. Louis T. Co.*, 109 Mo. App. 235, 84 S. W. 184, by the St. Louis court of appeals, correctly announce the law as applicable to the lien of an attorney under the act upon which this proceeding is predicated, and they fully meet the approval of this court.

There is no merit in the insistence of appellant that the court erred in its refusal to make a finding of the facts in this cause. In the first place, the bill of exceptions, as shown in the abstract of record, discloses that there were no objections or exceptions preserved to the refusal of this request. Secondly, it is expressly admitted by counsel for appellant in their brief that there was no dispute about the facts; that the proof in this cause establishes the allegations as contained in the statement of the cause of action before the justice of the peace; that being true, there was no necessity for a finding of the facts. Under the plain admission of counsel at the close of the evidence in this case, there was nothing left except a question of law.

We shall not prolong this opinion to discuss the numerous instructions requested by the defendant and refused by the court. They have had our most careful consideration. There were nineteen instructions requested ⁶⁴⁶ in this cause; clearly, more than there was any necessity for—a practice which has repeatedly met the disapproval of this court. They were all refused with the exception of one, and, in our opinion, properly so.

We have indicated our views upon the propositions presented by the record in this cause, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

Class Legislation is not Unconstitutional, provided the class is composed of individuals possessing in common some disability, attribute, or qualification, or in some condition marking them as proper objects for legislation: *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 98 Am. St. Rep. 254; *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73.

A Plaintiff may Dismiss His suit at pleasure, as a rule, without the intervention of his attorney: *Tompkins v. Railroad*, 110 Tenn. 157, 100 Am. St. Rep. 795; *Boogren v. St. Paul etc. Ry. Co.*, 97 Minn. 51, 114 Am. St. Rep. 691; note to *Cameron v. Boeger*, 93 Am. St. Rep. 175.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

**STATE v. DISTRICT COURT OF TWELFTH JUDICIAL
DISTRICT.**

[34 Mont. 96, 85 Pac. 866.]

FOREIGN WILL—Contest of Application to Probate.—While the statutes of Montana do not in express terms provide for the contest of an application to the courts of that state for the probate of a foreign will, they do so impliedly, for section 2351 of the Code of Civil Procedure, which has to do with the subject, provides for a hearing of such application and for notice thereof. (p. 512.)

FOREIGN WILL—Contest of Application to Probate.—While no particular grounds of contesting an application for the probate of a foreign will are expressly designated by the Montana statutes, section 2352 of the Code of Civil Procedure does enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore the grounds for such contest. (p. 512.)

PROBATE OF WILL.—A Judgment in a Probate Proceeding is a judgment in rem; that is, it determines the status of the subject matter. Therefore, the judgment of a court admitting a will to probate fixes the status of the instrument as a will, and becomes at once conclusive upon the world of all the facts necessary to the establishment of a will, among which are, that at the time the will was executed the testator was of sound and disposing mind, and was not acting under duress, fraud, or undue influence. (p. 515.)

FOREIGN WILL.—To Entitle a Foreign Will to Probate here, it must appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes. (p. 516.)

FOREIGN WILL—Conclusiveness of Probate.—A will executed in California by a testator there residing, and subsequently admitted to probate in that state, may not, when afterward admitted to ancillary probate in Montana, where the testator left real and

personal property, be contested on the ground that the testator was not of sound and disposing mind, or acted under duress, fraud, or undue influence, the Montana statutes providing that when such foreign will is admitted to probate in this state it shall "have the same force and effect as a will first admitted to probate in this state." (pp. 513, 517, 518.)

F. E. Stranahan, for the appellant.

George H. Stanton and J. A. McDonough, for the respondents.

⁹⁷ HOLLOWAY, J. Prior to his death, which occurred at San Francisco, on March 7, 1904, G. F. Deletraz made and published two wills, ⁹⁸ the first of which for convenience will be designated the "Mossholder will," and the last the "Ruef will." Such proceedings were had in the superior court of San Francisco that the Ruef will was duly admitted to probate, and letters testamentary issued to the person named as executor in that will. The decedent had real and personal property in Chouteau county, Montana, and in May, 1904, after the will had been admitted to probate in California, a copy of such will and the probate thereof, duly authenticated, were produced by the executor with a petition for letters, and filed in the district court of Chouteau county, where such proceedings were had that thereafter, on December 30, 1904, it appearing to that court from the record that said will had been proved, allowed and admitted to probate in the state of California, and that it was executed according to the laws of California, a decree was duly given and made admitting such will to probate.

Thereafter, on February 2, 1905; certain devisees, and the executor named in the Mossholder will, filed in the district court of Chouteau county what purported to be a contest in writing of the Ruef will, which writing sets forth as the ground of contest that, at the time of making the Ruef will, the testator, Deletraz, did not have mental capacity to make a will and was acting under fraud, misrepresentation and undue influence of certain other persons, and prays that the order admitting the Ruef will to probate be annulled; that the letters issued thereon be revoked; that the Mossholder will be admitted to probate; and that letters testamentary issue to the executor named in that will. To this contest the relator, the executor named in the Ruef will, demurred on the ground that the district court of Chouteau county has not

jurisdiction to hear such contest, and that the so-called contest in writing does not state facts sufficient to constitute any ground of contest. This demurrer was overruled, and, the district court being about to proceed to hear such alleged contest, an application was made to this court for a writ of prohibition restraining the district court of Chouteau county and the Honorable Jere B. Leslie, judge of said court, for the purpose of hearing all the proceedings in connection ²² with this matter, the resident judge being disqualified, from further proceeding with said alleged contest. An alternative writ was issued, and upon the return the matter was submitted upon a motion to quash the alternative writ and dismiss the proceedings.

The question which arises, and which was submitted for determination is: May a foreign will, after it has been admitted to probate in this state, be contested in the courts of this state upon the ground that the testator at the time of making such will was not of sound and disposing mind, or was acting under duress, fraud or undue influence?

A "foreign will," in the sense that the term is used throughout this opinion, is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered for ancillary probate in this state, as was the case with the will now under consideration.

While our code does not in express terms provide for the contest of an application to the courts of this state for the probate of a foreign will, it does so impliedly; for section 2351 of the Code of Civil Procedure, which has to do with the subject, provides for a hearing of such application, and that notice of such hearing shall be given. If objections could not be made at such hearing, then there would be no reason for requiring a hearing or notice thereof, and the mere fact that a hearing is required to be had, and proper notice of such hearing given, implies that some kind of objections may be interposed. The only specifications of grounds of contest of a domestic will are to be found in section 2340 of the Code of Civil Procedure, and they are not designated as such, but as the issues which may be raised and which the court is required to try and determine.

So, likewise, while no particular grounds of contesting an application for the probate of a foreign will are expressly des-

ignated, section 2352 of the Code of Civil Procedure does enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore ¹⁰⁰ the grounds of such contest. But these questions arise upon the hearing of the application for probate, and are to be tried by the record itself, and have not any reference to proceedings after the will has been admitted to probate here.

As these proceedings are purely statutory, and the statute makes no specific provision for the contest of a foreign will after probate, we might dispose of this proceeding by saying that the provisions of section 2352 above are exclusive, except as to the question of jurisdiction of the court of the sister state over the subject matter, and likewise the question of the jurisdiction of the Montana court, which might be raised independently of statute.

But attention is directed to one portion of section 2352, above, which provides that, when such foreign will is admitted to probate in this state, it shall "have the same force and effect as a will first admitted to probate in this state," and the argument is made that, as the probate of a domestic will or the validity of such will is subject to contest within one year after such probate, and as the foreign will when admitted has the same force and effect as the domestic will, therefore the probate of the foreign will in the courts of this state and the validity of such will are likewise subject to contest within a like period.

When the proper record of the probate of the will in the court of a sister state having jurisdiction is presented in a district court of this state likewise having jurisdiction of the subject matter, the question arises, What force and effect shall be given by the courts of this state to such record?

Section 1, article 4 of the constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Pursuant to this direction, section 905 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 677) was enacted, which, after providing for the manner of authenticating such records,

reads: "And the said records and judicial proceedings, so authenticated, shall have ¹⁰¹ such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Section 3201 of our Code of Civil Procedure also provides: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

Section 1908 of the California Code of Civil Procedure, which is pleaded in the petition for the writ of prohibition, is as follows: "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person."

The decree of the superior court of California, then, must be deemed conclusive upon the court in Chouteau county, of every matter with respect to which it is conclusive in California. Section 1908 above is not very definite. A judgment in respect to the probate of a will is conclusive upon the will. Conclusive of what? In *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. the supreme court of California, in considering an attack made upon the decree admitting the Broderick will to probate, after reviewing the authorities at length, says: "This review of the cases decided in England and in the United States establishes that it is a perfectly settled doctrine that the decision of the court to which the proof of wills is confided, whether of real or personal estate, is conclusive upon the question of the validity or invalidity of the will." The reference here to real ¹⁰² estate, of course, applies to real estate within the jurisdiction of that court.

It is generally conceded that a judgment in a probate proceeding is a judgment in rem; that is, it determines the status of the subject matter. Therefore, the judgment of the California court admitting the will to probate there fixed the status of the instrument as a will, and became at once conclusive upon all the world of all the facts necessary to the establishment of a will, among which are that, at the time the will was executed, the testator was of sound and disposing mind and was not acting under duress, fraud, menace or undue influence: 16 Ency. of Pl. & Pr. 1073; note to *Bowen v. Johnson*, 73 Am. Dec. 53 (5 R. I. 112), where the authorities are cited. See, also, the leading case of *Crippen v. Dexter*, 13 Gray (Mass.), 330.

The decree of a court of this state first admitting a will to probate does establish such instrument as a will. It is true that such decree is not necessarily final. It may be reviewed on appeal, and is subject to attack within one year in a proper proceeding instituted for that purpose. But, until set aside by a proper proceeding, such decree is conclusive of all facts necessary to the validity of the will. If the foreign will, after being admitted to probate, is subject to a like attack, it follows necessarily that it must, when such attack is made, be proved as a domestic will. But this was never contemplated, and if it was, the mere fact that such foreign will may be required to be proved, as if probate thereof had never been had, would nullify the provision of section 905 of the United States Revised Statutes above, and render meaningless the sentence quoted from section 2352, above. These views are reinforced by the provisions of section 2360 of the Code of Civil Procedure, which provides that, in order to contest the probate of a will after such will has been admitted to probate, an interested party must file a petition in writing setting forth the grounds of contest, and this petition must be filed in the court in which the will was proved. But a foreign will admitted to probate here is not proved in the court of this state. Section 2350 of the Code of Civil Procedure provides: "All wills duly proved and ¹⁰³ allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the district court of any county in which the testator shall have left any estate."

In order to entitle a foreign will to probate here, it must first appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes, above. Of course, it must also appear that there is property within the jurisdiction of the Montana court subject to administration, and that the court of the sister state likewise had jurisdiction of the subject matter. But, when these facts do appear, "it [the foreign will] must be admitted to probate . . . and letters testamentary or of administration issued thereon": Sec. 2352, above.

But it may be said, conceding all this, the decree of the California court can only be conclusive of matters with respect to which that court had jurisdiction, and that this is the meaning which has been given uniformly to the constitutional provision quoted above; that the California court did not have jurisdiction of real estate situated in Montana, and therefore the decree of the California court admitting the Ruef will to probate only establishes that instrument as a will, in so far as it affects personal property, upon the principle "of international law originated by the necessities of commercial intercourse, founded on the fiction that movable property, wherever situate, is in the actual possession of the owner at his domicile, and universally accepted by comity with all the force of domestic law, that the personal property of every man is subject to the law of his domicile" (Irwin's Appeal, 33 Conn. 128); that the devolution of title to real estate in this state is to be determined by the laws of this state; and that the full faith and credit clause of the United States constitution, above, does not operate to the prejudice of this right. Assuming this to be true, and that the ¹⁰⁴ general rule is that, in the absence of statute, the probate of a foreign will devising real estate situated in this state does not establish the validity of such will in this state, upon the familiar principle that the *lex rei sitae* governs as to the formalities necessary to the transfer of real estate, whether testamentary or inter vivos, still this state may by statute give to a foreign will, which devises real estate located in this state, the same effect as is given to a will devising personal property only,

or a will executed in conformity with the laws of this state; and, if such statute is enacted, the probate of such foreign will in the courts of this state under that statute is conclusive as to the validity of the will to pass title to the land so devised: 23 Am. & Eng. Ency. of Law, 2d ed., 143.

Section 1731 of our Civil Code provides: "A will of real or personal property, or both, or a revocation thereof made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter." Provisions similar to this section, and to that portion of section 2352 quoted above, have frequently been construed.

The case of *Ives v. Salisbury's Heirs*, 56 Vt. 565, presents the precise question argued here, and the decision is upon similar statutory provisions. It is held that the questions of the testamentary capacity of the testator and his freedom from undue influence are foreclosed by the decision of the court of the sister state where the will was first admitted to probate.

Under statutes almost, if not quite, identical with our sections 2350, 2351 and 2352 of the Code of Civil Procedure, and section 1731, Civil Code, above, the supreme court of Minnesota says that the ancillary probate is mostly a mere matter of form, and holds that these statutes make the judgment of a sister state, admitting the will to probate, conclusive as to the validity of the will, and that the proceedings to probate it in Minnesota are much in the nature of a suit upon a foreign judgment: *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020; *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258; *Page on Wills*, sec. 30; *Green v. Alden*, 92 Me. 177, 42 Atl. 358; *Crippen v. Dexter*, 13 Gray (Mass.), 330; *Irwin's Appeal*, 33 Conn. 128; *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584.

Reference is made to section 1838 of our Civil Code, which reads as follows: "Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real estate within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile." This section must be read in connection with section 1731, above, and without doubt refers to particular devises which are prohibited by the laws of Montana, and, probably, to con-

ditions such as are enumerated in sections 1729, 1744, 1751, and 1752 of the Civil Code, and probably to other like questions which are not in controversy in this proceeding.

From these considerations it follows that, by giving full force and effect to the decree of the California court admitting the Ruef will to probate, and adjudging that such will was executed according to the law of California where it was executed, such will, when admitted to ancillary probate in Chouteau county, operates to transfer all property, real and personal, of the testator, to the same extent that a will drawn in Montana, in conformity to the laws of Montana, and duly probated here in the first instance, would transfer it. Section 1731, above, then, makes applicable the provisions of section 1, article 4 of the constitution above, and section 905 of the United States Revised Statutes, to the decree of the California court admitting the Ruef will to probate, even though that will devises real estate situated in Montana, and that decree is conclusive upon the court in Chouteau county to the same extent respecting the Ruef will as if it transferred personal property only.

We think that the questions of the testamentary capacity of the testator and his freedom from duress, fraud, misrepresentation or undue influence, when executing the Ruef will, are foreclosed by the decree of the California court, and that ¹⁰⁶ the district court of Chouteau county is without jurisdiction to inquire into them.

The motion to quash the alternative writ and dismiss the proceedings is overruled. It is ordered that the peremptory writ of prohibition issue according to the prayer of the petition.

Writ issued.

Mr. Chief Justice Brantly and Mr. Justice Milburn concur.

CONCLUSIVENESS OF FOREIGN PROBATE OF WILL.

The probate of a will in one state or country is conclusive as to the title of personal property in another state or country: *Newcomb v. Newcomb*, 108 Ky. 582, 57 S. W. 2; *Martin v. Stovall*, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130. But the probate of a will of real property in one state is of no force in establishing the validity of the will as to real property in another state, unless the statutes of the latter state so permit. It can obtain such force and effect only by virtue of some law of the state in which the realty is situated: See the note to *Estate of Clark*, 113 Am. St. Rep. 215;

Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41; Kieth v. Johnson, 97 Mo. 223, 10 S. W. 597; McCormick v. Sullivan, 10 Wheat. (U. S.) 192, 6 L. ed. 300; Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. Rep. 407, 27 L. ed. 1049.

"The incidents of real estate, its disposition, and right of succession, depend upon the *lex rei sitae*. The validity of bequests of personal property depends upon the law of the testator's domicile, and the validity of devises of real property upon the law of the state where the lands lie. Hence a will executed according to the testator's domicile will pass personal property wherever situate; but, with respect to devises of land, the will must be executed according to the prescribed formalities of the state in which the land is situated. The courts of one state are without jurisdiction over the title to lands in another state; and the clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction. Hence the probate of a will in one state, though conclusive as to title to personalty, if probate be made at the domicile of the testator, is of no force in establishing the sufficiency or validity of a devise of land in another state. It can obtain such force only in virtue of some law of the state in which the lands are situated": Nelson v. Potter, 50 N. J. L. 324, 15 Atl. 375.

"The probate of a will," to quote from Clayson v. Clayson, 24 Or. 542, 34 Pac. 358, "does not establish its validity as a will devising real property in another state, unless the laws of the latter state permit it. It is essential, therefore, in order that a foreign will be effective to convey real estate situated in Oregon, that it not only be executed in the manner prescribed by the law of the state, but also that it be proved in the foreign jurisdiction in the manner required by such law."

Undoubtedly the legislature is competent to modify the rules of the common law on this question, and in many states the legislatures have done so. Thus, to quote from the supreme court of Minnesota, "our statute clearly recognizes as valid and indisputable a foreign will thus duly probated at the foreign domicile, and the proceedings by which it is probated in this state are mostly a matter of form": Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020.

The statutes of Montana and North Dakota provide: "A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicile in this state, is as valid when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter": Mont. Civ. Code, sec. 1731; N. Dak. Rev. Codes, sec. 5097. And in making provision for the probate of foreign wills, the statutes

of these states declare: "If, on the rehearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon": Mont. Code Civ. Proc., sec. 2352. North Dakota Revised Codes section 8037, is substantially the same.

Under these statutes, the supreme court of Montana holds in the principal case, ante, page 510 that a will which has been admitted to probate in California, and subsequently admitted to probate in Montana in a county there where the testator left real estate, cannot be contested in the latter court on the ground of want of testamentary capacity, undue influence, fraud, and the like, these questions being foreclosed by the decision of the California court when the will was there first admitted to probate.

The decision of the Montana court is supported by *Crippen v. Dexter*, 79 Mass. (13 Gray) 330; *Ives v. Salisbury's Heirs*, 56 Vt. 565. In the latter case the testatrix, although her domicile was in Vermont, made her will and died in Indiana. The will was probated in the courts of Indiana, they having jurisdiction, inasmuch as she left property and debts in that state. In holding that the will could not thereafter be attacked in Vermont by proving testamentary incapacity and undue influence, the court said: "Section 2057, R. L. provides: 'A will made out of the state, which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed and recorded in this state, and shall then have the same effect, as if executed according to the law of this state.' Hence this will, if executed according to the laws of Indiana, may be proved, and have full effect given to it upon both the real and personal estate of the testatrix in this state, whether the will were proved originally in the probate court of the domicile in this state, or by duly authenticated copies of the record of its proof in Indiana, the courts of that state having, as is found and conceded, jurisdiction to take proof of its due execution according to the laws of that state, and to probate it. As personal property generally in probate proceedings has no situs of its own, but takes the situs of its owner, a will valid to convey the personal property of the estate where it is made is generally operative to convey such personal estate wherever in fact it may at the time happen to be. To convey real estate, the will must be executed with the formalities required by the law of the place where the real estate is located. As we have seen, the law of this state gives the same effect to a will duly executed abroad, in accordance with the laws of another state as that country gives to it. On these views,

the only question open to the contestants, when the will with duly authenticated copies showing its probate in the proper court in Indiana was produced, was in regard to the jurisdiction of such court to make probate of the will. Such jurisdiction being found and conceded, the county court correctly held that the contestants were estopped from averring and proving want of testamentary capacity or undue influence."

In *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258, the question presented is, to use the language of the court, "whether real property situated in this state can be effectually disposed of by a will having but two subscribing witnesses. The answer depends upon where the will is made. If made in this state, it will not. Our law requires at least three subscribing witnesses. But if made in another state or country, where but two subscribing witnesses are required, or if first proved and allowed in another state or country according to the laws thereof, and then legally allowed and recorded in this state, as it may, it will."

The Wisconsin statute in providing for the proof and recording in that state of the foreign probate of a will, declares: "If, on the hearing, it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, . . . the will shall have the same force and effect as if it had been originally proved and allowed in the same court." Under this statute the supreme court of Wisconsin has recently affirmed that where a testatrix died at her home in Nebraska, leaving property in that state and also in Wisconsin, and her will is originally probated in Nebraska by a court of competent jurisdiction and in accordance with the procedure of that state, such probate is conclusive in Wisconsin, on the hearing there for its proof and recording, although certain minors were not represented, in the original proceedings, by guardian ad litem or otherwise. In reversing the judgment of the circuit court, the supreme court of Wisconsin said: "The mistake was made, it seems, by looking to the essentials of a valid original probate of a will in this state, instead of such essentials in Nebraska. The language of the statute is not to the effect that if it appears that the former probate was according to the laws of this state the will shall be admitted in the secondary proceedings with like effect as if they were primary. To the contrary it says: 'If, on the hearing, it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, . . . the will shall have the same force and effect as if it had been originally proved and allowed in the same court'": *In re Gartsen's Will*, 127 Wis. 602, 106 N. W. 1096.

The law of Massachusetts "gives the same force and effect to a foreign as to a domestic will, if made in conformity with the laws of the state or country where it was executed, and which might be proved and allowed according to the laws of such state or country."

Accordingly, a decree of a probate court of Connecticut, admitting a will to probate within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in Massachusetts, where the decedent left real estate, although no notice of the offer of the will for probate in the Connecticut court was given, the law of that state requiring no such notice: *Crippen v. Dexter*, 79 Mass. (13 Gray) 330.

STATE v. DISTRICT COURT OF FIFTH JUDICIAL DISTRICT.

[34 Mont. 112, 85 Pac. 872.]

JUSTICE'S COURT.—The Filing of a Notice of Appeal from a justice of the peace to the district court under section 1760 of the Code of Civil Procedure must precede, or be contemporaneous with, the service thereof on the adverse party or his attorney, otherwise the district court does acquire jurisdiction. (p. 525.)

JUSTICE'S COURT.—A Party Wishing to Appeal from a justice of the peace must pursue the statutory method strictly, and a failure to do so does not divest the justice's court of its jurisdiction. (p. 528.)

Clark & Duncan, for the appellant.

John B. Clayberg and S. V. Stewart, for the respondents.

¹¹⁴ **HOLLOWAY, J.** In August, 1905, an action was commenced in the justice of the peace court of Union township, Madison county, by Amos C. Hall et al. against J. H. Owen et al. By agreement the venue was changed to Hot Springs township, where the cause was tried, a verdict returned in favor of the plaintiffs, and judgment entered on the verdict on November 28, 1905. On December 1st a notice of appeal was served on counsel for plaintiffs, and on December 4th this notice was filed in the justice of the peace court. The transcript of the justice's docket and the papers in the case were lodged with the clerk of the district court, and on January 2, 1906, plaintiffs moved to dismiss the appeal on several grounds, among which were, that the pretended appeal had not been perfected as required by law, and that a notice of appeal had not been filed and served upon the plaintiffs or their counsel as required by law. This motion was overruled, and the district court being about to proceed to try the cause,

an application was made to this court for a writ of prohibition to restrain the district court and the judge thereof from further proceeding. An alternative writ was issued, and on return an answer was filed. Upon the hearing it was conceded that the petition and answer correctly state the facts.

The only question for determination is, Did the district court acquire jurisdiction of the case of Hall et al. v. Owen et al.? Section 1760 of the Code of Civil Procedure provides for appeals from the justice of the peace court to the district court, and, respecting the manner of effecting such appeals, prescribes: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." These appeals are purely matters of statutory regulation (*State v. Whaley*, 16 Mont. 574, 41 Pac. 852, and cases cited), and it becomes important, then, to know whether the order in which the notice of appeal is filed and served is of consequence. The statute provides that such notice must ¹¹⁵ be filed and served. In this instance the notice was served on one day and not filed until three days later.

The question is not a new one. It has been before this court and before the supreme courts of California, Nevada, Colorado, Idaho, and Washington. An early California statute provided: "Art. 1071, sec. 337. The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney": Wood's California Digest, 1850-58, p. 210. Construing this statute in *Hastings v. Halleck*, 10 Cal. 31, the supreme court of that state held that the filing of the notice of appeal must precede or be contemporaneous with the service, and if the service preceded the filing, the notice was of no effect and did not perfect the appeal. This was followed in *Buffendeau v. Edmondson*, 24 Cal. 94, *Warner v. Holman*, 24 Cal. 228, *Moulton v. Ellmaker*, 30 Cal. 527, *Boston v. Haynes*, 31 Cal. 107, *Foy v. Domec*, 33 Cal. 317, and in *Lynch v. Dunn*, 34 Cal. 518.

The statute of Nevada in force in 1873 was identical with the California statute above: Nev. Comp. Laws, 1873, tit. 9, c. 1, sec. 331. In *Lyon County v. Washoe County*, 8 Nev. 177, in construing this statute, the supreme court of Nevada

said: "It is well settled that to render an appeal effectual the filing of the notice of appeal must precede or be contemporaneous with the service of the copy; otherwise that which purports to be a copy fails as such for want of an original to support it. It is ordered that the appeal be dismissed." This decision has since been affirmed in *Johnson v. Badger M. & M. Co.*, 12 Nev. 261, and in *Rees Gold etc. Min. Co. v. Rye Patch Con. etc. Min. Co.*, 15 Nev. 341, and in *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 264, 52 Pac. 575, decided in 1898.

The Colorado statute in force in 1879 is as follows: "Sec. 339. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and executing an undertaking as hereinafter prescribed, ¹¹⁶ and serving a copy of the notice upon the adverse party or his attorney": Colo. Code Civ. Proc., tit. 9, c. 35, p. 125. With these provisions in force, the supreme court of Colorado in *Alvord v. McGauhy*, 4 Colo. 97, held that unless the filing of the notice of appeal precedes or is contemporaneous with the service thereof, it is ineffectual for any purpose and the appeal is not perfected. This was followed and approved in *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, construing a statute then in force in all material respects the same as the one considered in *Alvord v. McGauhy*, 4 Colo. 97.

The Idaho statute in force in 1875 was also identical with the California statute above: Idaho Laws 1864, tit. 9, c. 1, p. 141. This statute was considered in *Slocum v. Slocum*, 1 Idaho, 589, and the supreme court of Idaho said: "By this statute it becomes necessary as a part of the notice that it should be filed, and consequently it must precede or be contemporaneous with the service of a copy on the adverse party. This has been decided in California under a statute similar to ours, and in adopting its statute we adopt the construction which has been given to it by the courts of that state. Before the court can take jurisdiction of an appeal the filing of the notice and the service of a copy thereof as prescribed by the statute must be had, and before the notice is filed, it possesses none of the elements of a notice, and consequently there can be no copy of it."

The code of Washington providing for appeals from a justice of the peace court to the superior court, in force in 1897,

among other things provided: "Sec. 1631. Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party or his attorney": Hill's Annotated Statutes and Codes of Washington, Code Civ. Proc., p. 612. This section was considered in *State v. Superior Court*, 17 Wash. 54, 48 Pac. 733, where it is held that the filing of the notice must precede the service, otherwise the superior court does not acquire jurisdiction. A similar provision respecting the filing and service of a statement was considered in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241, and the same condition reached.

¹¹⁷ In 1876 we had in this state the following provision respecting appeals to this court from the district courts: "Sec. 370. The appeal shall be made by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney": Codified Statutes of Montana, 7th Sess., 1871-72, tit. 9, c. 1, p. 107. This statute is identical with the California, Nevada and Idaho statutes above, and in all material respects the same as the Washington and Colorado statutes quoted. In *Courtright v. Berkins*, 2 Mont. 404, this court said: "The statutes of California and Nevada regulating appeals are the same as those of this territory. The courts of these states hold that the filing of the notice of appeal must precede or be contemporaneous with the service of the copy thereof to render an appeal effectual. The failure of the appellants to comply with the civil practice act in this proceeding is an error which affects the jurisdiction of this court. . . . Appeal dismissed."

But it may be said that the statutes considered in the cases cited above, except the Washington case, relate to appeals from courts of record, while the statute now under consideration relates to appeals from a justice of the peace court, and that a different construction should be given to it. The district court evidently proceeded upon this theory, following the decisions of the supreme courts of California and Idaho. After the California cases above were decided, the supreme court of California in *Coker v. Superior Court*, 58 Cal. 177, in considering sections 974 and 978 of the California Code of Civil Procedure, which correspond with sections 1760 and 1763 of

our Code of Civil Procedure, without giving any reason for its conclusion and without referring to its former decisions above, announced the doctrine that in order to effectuate an appeal from a justice of the peace court, three things are necessary, namely: "The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking. . . . The mere order in which they are done ¹¹⁸ within that time is not material." This decision was followed in *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; 71 Cal. 550, 12 Pac. 672. That the decision in the *Coker* case was wholly illogical is demonstrated when the legitimate result of such holding is reached, as was done in *Dutertre v. Superior Court*, 84 Cal. 535, 24 Pac. 284. In that case the undertaking on appeal was filed eleven days before the notice of appeal was served, and eleven days before the adverse party had any intimation that an appeal would be taken, and notwithstanding the California Code, section 978 above, specifically confers upon such adverse party the right to except to the sufficiency of the sureties within five days after the filing of the undertaking, as does our section 1763 above, the court held, following the *Coker* case (58 Cal. 177), above, that the appeal was nevertheless perfected, a conclusion which can have but one result, namely, the annulment of the provision permitting the adverse party to except to the sufficiency of the sureties, for that right is only in existence for five days after the undertaking is filed; and yet a court has the same authority for saying that the undertaking on appeal may be filed before the filing or service of the notice, as it has for saying that the notice may be served before it is filed. Either conclusion is directly opposed to the express language or the evident meaning of the statute.

In *Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884, the same doctrine is announced as in the *Coker* case (58 Cal. 177). We think the result reached in the *Dutertre* case (84 Cal. 535, 24 Pac. 284), above is nothing short of judicial legislation, or, what is the same thing, a construction by a court of plain language to mean what it does not say. There is not any reason apparent which will give to the same language one meaning when it applies to the district court practice, and a contrary meaning when applied to the justice of the peace court practice. Assuming that the words, "the

order of service is immaterial," were intended to mean that it is immaterial whether the notice is first filed or served, it is worthy of consideration to note that it required an act of the legislature to add those words to section 370 of the district court practice act of 1871-72, and this court cannot undertake to amend section 1760 above ¹¹⁹ in the like particular, and nothing short of an appropriate amendment would justify the conclusion for which respondents are contending. That legislation is needed is apparent, but this court ought not to effect it by construction which does violence to the language employed.

The history of our statute regulating appeals is of interest. By an act approved January 12, 1872, a civil practice act was adopted which contained section 370 quoted above, which applied to appeals to the supreme court. It also contained section 411, which applied to appeals from the probate court, and section 742, which applied to appeals from the justice of the peace court. These sections were all of like import. By an act approved February 16, 1877, a year after the decision in *Courtright v. Berkins*, 2 Mont. 404, was rendered, sections 370 and 411 of the practice act of 1872 were repealed, and new sections adopted in lieu thereof. Section 409, enacted in lieu of 370, above, was of like import, but to it was added the clause "the order of service is immaterial," etc. This act re-enacted section 411 above in terms, as section 437, and did not assume to change in any manner section 742 of the practice act of 1872. These sections of the act of 1887, and section 742 above, were carried into the revision of 1879, first division, as sections 409, 437 and 802, respectively; and into the Compiled Statutes of 1887, as sections 422, 450 and 822, first division. The section respecting appeals from the probate court became nugatory upon the adoption of the constitution. The sections respecting appeals from the district court and from the justice of the peace court were carried into the Code of Civil Procedure of 1895, as sections 1724 and 1760, respectively.

It is to be observed that since 1877 there has not been any material change in any of these sections referred to; that while the section respecting the method to be pursued in appealing from the district to the supreme court was amended in 1877, the sections referring to appeals from the justice of the peace to the district court has continued in force without

any substantial alteration for more than thirty years, and has been re-enacted over and over again without modification and with the full ¹²⁰ knowledge which the legislatures had of the construction given a similar statute as early as 1876. We must presume, therefore, that in amending the district court practice act and repeatedly re-enacting the justice of the peace practice act without alteration, the legislature intended that the construction given in *Courtright v. Berkins*, 2 Mont. 404, should apply to the practice act regulating appeals from a justice of the peace court; and as it is the province of this court to determine the intention of the legislature, if possible, and apply the law as thus ascertained, we are not warranted now in departing from the former holding of this court and from the rule announced by other courts in construing like statutory provisions. Neither do we think that the provisions of sections 778 and 3453 of the Code of Civil Procedure have any application to the question presented in this proceeding.

We are satisfied that the provisions of section 1760 above were intended to be, and are in fact, mandatory, and that a party wishing to appeal from a justice of the peace court must pursue the statutory method strictly, and a failure to do so does not devert the justice of the peace court of its jurisdiction: 2 Ency. of Pl. & Pr. 16; *Green v. Castello*, 35 Mo. App. 127; *Sholty v. McIntyre*, 136 Ill. 33, 26 N. E. 655.

As disclosed by the record before us, the district court of Madison county was without jurisdiction to try the case of *Hall et al. v. Owen et al.*, and a peremptory writ of prohibition should issue in conformity with the prayer of the petition. The writ is directed to issue accordingly.

Writ issued.

Mr. Chief Justice Brantly and Mr. Justice Milburn concur.

Rehearing denied June 16, 1906.

The Decision in the Principal Case seems reasonable on principle, and, as the cases therein cited indicate, it is supported by the weight of authority.

TANNER v. BOWEN.

[34 Mont. 121, 85 Pac. 876.]

TORT—Release of One of Two Wrongdoers.—If A lets his horse to B, who is a livery-stable keeper, and B hires the animal to C., whose alleged negligence causes its death, whereupon A demands a settlement from both B and C., and B., acknowledging his liability, pays A the value of the horse and takes an assignment of A's supposed cause of action against C, B cannot maintain an action against C for the tort, since A, having been paid and satisfied by B. has no cause of action which he himself could assert against C., and therefore his assignee can have none. (p. 531.)

E. L. Bishop, for the appellant.

123 HOLLOWAY, J. The facts disclosed by the record are that John H. Devlin was the owner of a certain horse and let it to the plaintiff Tanner, who was a livery-stable keeper at Conrad, Teton county, for use in his livery business. The defendant Bowen hired a team and buggy from Tanner on December 1, 1904, to drive to Chouteau, and the Devlin horse and another were furnished to him by Tanner. Bowen made the trip with the team to Chouteau, and on the following morning it was ascertained that the Devlin horse had died. Devlin asserted a claim for the value of the horse against both Tanner and Bowen and demanded a settlement for the same from each. Upon the trial it was made to appear that Tanner admitted Devlin's claim, acknowledged his own liability, paid to Devlin the value of the horse in satisfaction of Devlin's claim, took an assignment of Devlin's cause of action as against Bowen, and as such assignee brought this action to recover from Bowen the value of the horse, alleging in his complaint that the death of the horse was caused by negligence on the part of Bowen. The answer denies any negligence on Bowen's part. A verdict was returned in favor of the plaintiff, a judgment entered thereon, and from the judgment and an order denying him a new trial, the defendant appealed.

The only error assigned in the brief of appellant is that the court erred in refusing to instruct the jury to return a verdict for the defendant as requested by him. In discussing this alleged error, counsel for appellant makes three distinct contentions, only one of which it will be necessary to consider.

It is said that plaintiff Tanner, having paid to Devlin the

amount of Devlin's claim in satisfaction of the same, thereby discharged Bowen from liability. As to whether Tanner was in fact liable might be a question, but this liability was admitted. The payment by Tanner to Devlin and the attempted assignment ¹²⁴ of Devlin's cause of action operated as a complete satisfaction of Devlin's claim and a release of Tanner from any further liability. In *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, it is said: "The validity and effect of a release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not." The principle underlying this decision is that if, when the release was given, Devlin was asserting against Tanner a liability for the same act for which Tanner now asserts the liability of Bowen, the two causes of action are the same and the release of one discharges the other. The decision above is referred to with approval, and the doctrine there announced is again asserted, in *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344, and numerous other cases are cited in support of the conclusion reached: 1 Cyc. 317.

If Devlin, instead of merely presenting his demand against Tanner and Bowen separately, had sued each, as he might have done, and had recovered a judgment against each, and if Tanner had then paid the judgment against himself and had taken an assignment from Devlin of the judgment against Bowen, the situation would not have been different from that which is presented by this record, and under those circumstances it is quite clear that the judgment against Bowen could not have been enforced.

A case directly in point is *Gross v. Pennsylvania etc. R. Co.*, 47 N. Y. St. Rep. 374, 20 N. Y. Supp. 28. The plaintiff recovered separate judgments against the Pennsylvania etc. Railroad Company and the Central New England etc. Railroad Company for an injury caused by the negligent acts of those companies. The New England company paid the judgment against it and took an assignment of the judgment against the Pennsylvania company. The Pennsylvania company then moved the court to cancel the judgment against it. In reversing the trial court for refusing this motion, the supreme court of New York said: "It is claimed by the assignee of the judgment that, as between it and the defendant (the Pennsylvania company), it was the ¹²⁵ negligence of the latter

that caused the injury, . . . and that hence it is not precluded from recovering indemnity or contribution from its cotort-feasor. This may be, but has no effect on this application. On this motion the Central New England etc. Company has but the same rights as its assignor, the plaintiff. As the plaintiff could not collect anything from the defendant after satisfaction by the other company, his assigns cannot."

Section 571 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment," etc. If, then, when Devlin assigned his pretended cause of action against Bowen to Tanner, he (Devlin) had been paid by Tanner for all damages sustained by him, under the circumstances of this case the defense of payment or satisfaction could have been interposed by Bowen, and when these facts were developed upon the trial, the defendant's request for an instruction for a verdict in his favor should have been granted. Devlin, having been paid and satisfied by Tanner, did not have any cause of action against Bowen which he could assert in court himself, and, of course, if he could not assert it, his assignee could not.

The judgment and order are reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Mr. Chief Justice Brantly concurs.

Mr. Justice Milburn, not having heard the argument, takes no part in the foregoing decision.

For Authorities bearing upon the decision in the principal case, see the notes to Louisville etc. Mail Co. v. Barnes, 111 Am. St. Rep. 281; Abb v. Northern Pac. Ry. Co., 92 Am. St. Rep. 872.

KNIGHTS OF MACCABEES v. SACKETT.

[34 Mont. 357, 86 Pac. 423.]

BENEFIT SOCIETY—Change of Beneficiaries.—Waiver of Irregularities.—A waiver by a mutual benefit association of a non-compliance with its by-laws by a member in changing his beneficiaries must, to be effective, occur during his lifetime; but if such noncompliance is so waived, the former beneficiary cannot, after the death of the insured, take advantage thereof. (p. 534.)

BENEFIT SOCIETY—Right to Change Beneficiaries.—A member of a mutual benefit association may change his beneficiaries; but, as a rule, to which there are exceptions, he must proceed in accordance with the regulations contained in the policy and by-laws, and any material deviation therefrom will invalidate the transfer. (p. 534.)

BENEFIT SOCIETY—Change of Beneficiaries—Where not Effected.—If the by-laws of a benefit association provide that a change of beneficiaries takes effect upon a delivery to the local record-keeper of a written request for a change, and a member deposits his application for a change in the mail, the change is not effected if he dies before the delivery of the mail to the record-keeper. By making the mail his agent, he assumes the risk of such a failure of or delay in the delivery of his request as will prevent its becoming effectual. (p. 536.)

BENEFIT SOCIETY—Change of Beneficiaries—When not Effected.—Where the by-laws of a benefit association provide that a change of beneficiaries takes effect upon a delivery to the local record-keeper of a written request for a change, and a member deposits such a request in the mail, which does not reach the post-office to which it is destined until after his death, though it is actually delivered on the day of such death only a few hours after its occurrence, the contemplated change does not affect the rights of the original beneficiary. (p. 537.)

O. F. Goddard, for the appellant.

W. M. Johnston, for the respondent.

³⁶¹ **HOLLOWAY, J.** Floyd L. Sackett was a member of the order of the Knights of the Maccabees of the World, having his membership in the local tent at Park City, Montana. He carried insurance on his life in the association to the amount of one thousand dollars, his wife, Fannie Sackett, being named in the certificate of insurance as beneficiary. For some time prior to May, 1905, Floyd L. and Fannie Sackett had not lived together. The former made his home at ³⁶² Yule, North Dakota. The latter lived at Park City, Montana. Prior to May, 1905, Floyd L. Sackett wrote a letter to his mother at Park City, requesting her to call on the local record-keeper of the tent of which Floyd L. Sackett was a member,

and ask him to change the beneficiary in his certificate of insurance from Fannie Sackett to Clarence M. Sackett and wife. This request was accompanied by the required fee of fifty cents. The request was made of the local record-keeper by the mother of the insured, but she was thereupon informed that under the by-laws of the order the wife of Clarence M. Sackett could not be named as a beneficiary, and the record-keeper then filled out a proper application for change of beneficiary upon a blank form furnished by the association and mailed the same to Floyd L. Sackett, to be by him duly executed. This he did on May 8, 1905, and in the certificate he named his brother, Clarence M. Sackett, as sole beneficiary, and deposited this application in the postoffice at Yule, North Dakota, properly addressed to the local record-keeper at Park City. The letter containing this application was carried to Sentinel Butte, the nearest railroad point, in the usual course of business, and was taken by the westbound Northern Pacific train No. 3 on May 9th. This train passed through Park City in the early morning of May 10th; but train No. 3 in the course of its business did not leave mail at Park City, but carried the mail for that point on west until it met train No. 2, eastbound, when the mail for Park City was transferred to train No. 2 and by that train left Park City. The letter containing this application was therefore not delivered at Park City until May 10th at about 3 P. M., and was received by the local record-keeper immediately thereafter. In the meantime, however, Floyd L. Sackett on May 10th received a fatal wound and died at 9:45 A. M. of that day. Not knowing of Floyd L. Sackett's death, the local record-keeper forwarded the application with the fee to the supreme tent at Point Huron, Michigan, where on May 17th a new certificate was issued, in which Clarence M. Sackett was named as beneficiary. This new ³⁶³ certificate was received at Park City on May 21st and was delivered to Clarence M. Sackett.

After the death of Floyd L. Sackett both Fannie and Clarence M. Sackett made claim to the insurance money, and, in order to be relieved from annoyance, the governing body of the association commenced this action, setting forth these facts and asking that the claimants be brought into court and made to litigate their respective claims. The money was paid into court, the plaintiff association relieved from further liability, and the contending claimants then agreed upon the

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facts substantially as herein set forth. Upon this agreed statement of facts the court found the issues in favor of Fannie Sackett, and judgment in her favor was entered, from which Clarence M. Sackett appealed.

The contentions of appellant are succinctly set forth in his brief as follows: "Upon the foregoing statement of facts we assert the following propositions: 1. The deceased had a right to change the beneficiary in his certificate of insurance by complying with the by-laws of the association; 2. If he failed to comply with all of the by-laws of the association regarding such change, and the association waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the respondent cannot take advantage of such failure; 3. The deceased did all he could before his death to make the change of beneficiary from his wife to his brother (the appellant.) The association, by voluntary interpleading and paying the money into court, has waived noncompliance with its by-laws, and the court will consider that done which ought to be done."

1. The first contention may be conceded. It is too well settled to be open to argument.

2. As a legal proposition, the second contention is not stated accurately. It should be to the effect that, if the insured failed to comply with all of the by-laws of the association regarding such change, and the association during his lifetime waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the former ³⁶⁴ beneficiary could not take advantage of such failure. As thus stated there cannot be any question of the correctness of this contention, and as we understand him, counsel for respondent does not controvert the same.

That any waiver by the association must occur during the lifetime of the insured is too well settled in reason and by the authorities to require extended notice. The association contracts that it will at the death of the insured pay to the person named as beneficiary the amount of the policy. It is a contract between the association and the insured for the benefit of a third person, and the only interest of the beneficiary is in expectancy, until the death of the insured vests in the beneficiary the right to claim the amount of the benefit, and immediately upon the happening of that contingency a right of action in favor of the beneficiary arises which the courts will enforce. This being so, the reason for the rule that after the

death of the insured the association cannot waive anything to the prejudice of the beneficiary is perfectly apparent; and that this is the rule is beyond question: 1 Bacon on Benefit Societies and Life Insurance, sec. 308; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; 3 Am. & Eng. Ency. of Law, 2d ed., 998. By paying the money into court the association waived, so far as it could do so, the failure of the insured to comply strictly with the by-laws of the order; but such waiver could not impair rights which became vested upon the death of the insured.

3. With respect to mutual benefit insurance, it is well settled that the insured may at will change the beneficiary. It is a general rule that in making such change the insured must proceed in accordance with the regulations contained in the policy and by-laws of the association, and any material deviation from the course thus marked out will invalidate the transfer; but to this rule certain exceptions have been noted. In a leading case upon this subject these exceptions are announced as follows:

305 "1. If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued.

"2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made.

"3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary; but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued": *Supreme Conclave Royal Adelpheia v. Cappella* (C. C.), 41 Fed. 1.

Neither the first nor the second of these exceptions is relied upon here. The last contention of appellant, however, is that Floyd L. Sackett had brought himself within the third exception above, and a court of equity ought to decree the change of beneficiary from Fannie to Clarence M. Sackett to have taken place prior to the death of Floyd L. Sackett. We are

Fink v. Fink, 171 N. Y. 616, 64 N. E. 506, is well considered, is directly in point here, and, in our opinion, correctly states the rule as we have announced it.

The judgment of the district court is affirmed.

Mr. Chief Justice Brantly and Mr. Justice Milburn concur.

The Beneficiaries Named in a Mutual Benefit Society does not ordinarily acquire a vested interest in the mortuary fund during the lifetime of the member and he may change his beneficiaries in the manner prescribed by the rules and regulations of the society. Upon the death of the member the beneficiary's rights become vested: *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263; *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785; *Courtois v. Grand Lodge of A. O. U. W.*, 135 Cal. 552, 87 Am. St. Rep. 137.

In Making a Change of Beneficiaries, a member of a benefit society must, as a general rule, comply with the rules and regulations prescribed by the society: See the note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 561.

McCAULEY v. JONES.

[34 Mont. 375, 86 Pac. 422.]

MORTGAGE FORECLOSURE—Delay in Making Sheriff's Deed.—Where the purchaser at a foreclosure sale goes into possession at the expiration of the one year allowed for redemption, a deed executed on his application therefor nearly four years afterward by the sheriff, as successor of the sheriff making the sale, is valid notwithstanding the delay, no offer to redeem having been made. (p. 539.)

EJECTMENT—Title Acquired Pendente Lite.—The recovery of the plaintiff in ejectment may be defeated by the defendant showing title in himself acquired after the commencement of the action. (p. 539.)

MORTGAGE FORECLOSURE—Deed by Sheriff's Successor.—Under section 1237 of the Code of Civil Procedure, which makes it the duty of the sheriff who conducts a foreclosure sale, or if he is no longer in office, then his successor, to make a deed to the purchaser, any sheriff succeeding the one who makes the deed is the "successor" of such officer. (pp. 539, 540.)

Maury & Hogevoll, for the appellant.

C. F. Kelley, for the respondent.

376 MILBURN, J. Appeal from the judgment. The plaintiff sued the defendant in ejectment. The complaint is an ordinary one in ejectment. From the answer and replication it appears that the plaintiff was at one time the owner of certain real estate, and on September 21, 1895, made a

mortgage to Henry Knippenberg to secure a loan. The mortgage and notes were assigned to William D. Clark and upon default, the sheriff of the county, on the twenty-fourth day of March, 1900, sold the property at sheriff's sale under the mortgage to Clark, the sheriff being one Regan. On March 25, 1901,³⁷⁷ the previous day being Sunday, sheriff Regan executed and delivered to Clark a deed for the property described, the usual certificate of sale having been made, delivered and properly filed at the time of the sale. On January 19, 1905, a new deed was made by the then sheriff, John J. Quinn, to Clark. At the time of the delivery of the first sheriff's deed Clark went into possession of the property and afterward conveyed to respondent. The district court of Silver Bow county, Honorable George M. Bourquin, judge, gave judgment in favor of the defendant.

Seven questions are raised in the brief of the appellant. The only one necessary to be considered is whether or not the Quinn deed conveyed title to the grantee therein. If the Regan deed was void on account of having been made on Monday after the Sunday which was the last day of the year of redemption, then we should consider the case as if no deed had been made at all on the Monday. The year of redemption is for the benefit of the debtor in the mortgage suit. The purchaser went into possession after the expiration of the year of redemption. It does not appear that at any time before the second deed was executed there was any offer to redeem, even if such an offer could have availed the mortgagor after the expiration of the period of redemption. The law does not require the purchaser at a mortgage foreclosure sale to apply for the deed immediately upon the expiration of the year.

The defendant in this case applied for the second deed from the sheriff within a reasonable time, and in our opinion the deed was valid: 17 Cyc. 1743. A recovery by plaintiff in ejectment may be defeated by defendant showing title in himself, and this is so although he acquire the same subsequent to the commencement of the action: 15 Cyc. 62. This action was commenced on September 12, 1904, and the second deed from the sheriff was made and delivered pendente lite. Under section 1237 of the Code of Civil Procedure it is the duty of the sheriff who made the sale, if he still be in office, but if not, then of his successor, to³⁷⁸ make the deed. Any sheriff

succeeding the sheriff who made the first deed was the successor of such officer.

We find no error in the decision of the court below.

Affirmed.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

In Ejectment the Defendant may by proper plea show a title acquired by him after the commencement of the suit: Pollard v. Haurick, 74 Ala. 334; Roper v. McFadden, 48 Cal. 346; Robinson v. Parker, 11 Miss. (3 Smedes & M.) 114, 41 Am. Dec. 614.

STATE v. DISTRICT COURT OF TENTH JUDICIAL DISTRICT.

[34 Mont. 535, 88 Pac. 44.]

EMINENT DOMAIN—Selection of Route Along River.—In its exercise of the right of eminent domain, a railroad company has the right to select the particular route which it deems most advantageous; and, having selected a route with which a river interferes, it has the power to secure land necessary for its use in constructing and maintaining the road on that route in such a manner as to afford security for life and property. (p. 544.)

EMINENT DOMAIN—Change of River Channel.—The changing of the channel of a river, which otherwise would have to be crossed by a railroad in order to follow the route selected, when necessary to make the road secure for life and property, is part of the "construction" of the road itself. Hence the land necessary to make such change may be condemned. (pp. 545, 546.)

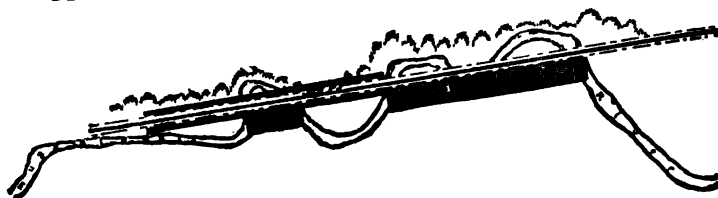
Fred H. Hathhorn and Harry A. Groves, for the appellant.

M. S. Gunn, for the respondent.

537 HOLLOWAY, J. The Chicago, Milwaukee and St. Paul Railway Company of Montana, having surveyed a route for a line of railroad and **538** a telegraph line from a point on the eastern boundary line of Montana, in Custer county, through the state to a point on the western boundary line, in Ravalli county, which route passes through the ranch of the Bloomington Land and Livestock Company, in Meagher county, and, having failed to agree with the land company upon the damages to be paid for the land sought by the railway company, commenced proceedings in condemnation in the district court.

The railway company seeks to secure a strip of land one hundred feet in width for a right of way, certain strips twenty-five feet in width in addition thereto for cuts and fills, and also a strip of two hundred feet in width for the purpose of changing the channel of the Musselshell river. A complaint was filed by the railway company setting forth the facts relative to its use for the lands sought to be acquired. The defendant land company appeared and filed a demurrer, which was overruled, and, after a hearing had before the judge of the court, an order was made appointing appraisers to determine the compensation to be paid by the railway company on account of the taking of the several pieces or parcels of land sought. Thereafter the commissioners made a report as required by law, and the railway company paid into court for the land company the amounts so fixed by the commissioners as compensation. Thereupon the land company applied to this court for a writ of supervisory control to annul the order overruling the demurrer of the land company, and also the order of the judge appointing commissioners. An order to show cause was issued, and, upon the return, the matter was submitted to this court upon the petition filed herein, and a demurrer thereto interposed on behalf of the district court and the judge thereof.

The question submitted for determination is, Did the railway company seek to acquire land which it is not entitled to acquire by the exercise of the right of eminent domain? The subjoined map or diagram shows the situation presented by this application.



 Right of Way

 25 ft. for Cuts and Fills

 200 ft. for Changing Channel

539 That the railway company could acquire, by condemnation, the land sought for a right of way one hundred feet

in width is not controverted. We are now asked to determine whether it may also invoke the aid of the power of eminent domain to acquire land in addition to the right of way for cuts and embankments, and for the purpose of changing the channel of the Musselshell river. This question must be determined from the provisions of our Civil Code and Code of Civil Procedure, the portions of which directly applicable are as follows:

Civil Code, section 526: "No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except as otherwise specially provided. A corporation may acquire real property as provided in the Code of Civil Procedure, title 7, part 3."

Section 890: "Any railroad corporation shall be authorized to locate, construct, maintain and operate a railroad with a single or double track, with such sidetracks, turnouts, machine-shops, offices and depots as may be necessary between any points it may select within the places named in the articles of incorporation as termini of such road," etc.

Section 894: "Every railroad corporation has power: 1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and employees ⁵⁴⁰ may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto.

"2. To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it to aid and encourage the construction, maintenance and accommodation of such railroad.

"3. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold and use all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots and other purposes necessary to successfully work and conduct the business of the road.

"4. To lay out its road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double

track, and with such appendages and adjuncts as may be necessary for the convenient use of the same.

"5. To construct their [its] road across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise. 6. . . .

"7. To purchase lands, timber, stone, gravel, or other materials, to be used in the construction and maintenance of its road and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, Code of Civil Procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as is provided hereinafter; but no such ⁵⁴¹ change must vary the general route of such road, as contemplated in its articles of incorporation. 8. . . .

"9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures, and machinery for the accommodation and use of their passengers, freight and business."

Section 901: "It shall be lawful for such corporation, whenever it may be necessary in the construction of its road to cross any road or stream of water, to divert the same from its present location or bed; but such corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness."

Section 2211 of the Code of Civil Procedure, as amended by act of March 7, 1899 (Session Laws 1899, p. 135): "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses, . . . railroads . . . telegraph lines."

In order to reach a conclusion we have considered these provisions as all parts of one statute, and that, too, without regard to the division into sections and subsections. Resort to the authorities is of little assistance. We must determine what these statutes mean, and to that end we have arrived at what we believe was the legislative intent, so far as applicable to the

question before us, and that intent is fairly stated by treating all the sections above as one statute, and paraphrasing it as follows:

Every railroad corporation has power: 1. To select the route which it deems most advantageous; 2. To receive donations of real estate in aid of the construction and maintenance of the road; 3. To purchase or receive by donation real estate necessary for the construction and maintenance of the road; 4. To secure such real estate as is necessary for sidetracks, for turnouts, for machine-shops, for offices, for depots, for stations, for the convenient buildings, fixtures, and machinery for its business, and for other adjuncts and appendages of like character; ⁵⁴² 5. To secure land, timber, stone, gravel, and other material to be used in the construction and maintenance of the road; 6. To build its road along, upon, or across any stream and to divert any stream from its present bed whenever in the construction of its road it is necessary to cross such stream.

These are the grants to the company. The limitations upon the powers granted and the exactions imposed upon the company are: 1. Its right of way shall be limited to two hundred feet in width, treating the right of way independently of the grant for cuts and embankments; 2. The amount of real estate which it may hold for any or all of the other objects or purposes named shall be limited to the necessities of the road; 3. The road shall be so constructed as to afford security to life and property; 4. Whenever a stream is interfered with, the company shall restore the same to its former state of usefulness, as near as may be, or so as not unnecessarily to impair its former usefulness.

When this company selected its route along and across the Musselshell river, it did not lie in the mouth of this petitioner to say that another route could have been chosen: 1 Current Law, 1009; 3 Current Law, 1193; *Dallas v. Hallock*, 44 Or. 246, 75 Pac. 204; 2 *Lewis on Eminent Domain*, 2d ed., 891. The company had the right to select the particular route which it deemed most advantageous, and, having selected such a route, with which the Musselshell river interfered, it has power to secure land necessary for its use in constructing and maintaining the road on such route in such manner as to afford security for life and property.

We think counsel for relator are in error in assuming that subdivision 4 of section 894 limits the power of the railway

company to condemn land or other property for railroad purposes generally. The power is granted the railway company to secure land sufficient to construct and operate its road, ⁵⁴³ with all necessary sidetracks, turnouts, machine-shops, offices, depots, and such other adjuncts and appendages as are necessary, and two limitations only are placed upon this grant of power: 1. The right of way shall not exceed a strip of land two hundred feet in width, except where a greater width is required for excavations and embankments; and 2. The land for excavations, embankments, sidetracks, turnouts, shops, etc., shall not exceed in extent the amount necessary for such uses or purposes.

Whether the grant contained in subdivision 7 is the same as that in subdivision 3, or whether the grant in subdivision 3 refers to lands upon which the road and its appendages and adjuncts rest, while subdivision 7 refers to lands the very soil and substance of which are to be used in the construction of the road and its maintenance, need not be considered, for we are of the opinion that any land necessary for the construction and maintenance of the road and its adjuncts and appendages may be acquired under subdivision 3 by purchase or by voluntary grant or donation, or may be acquired by condemnation proceedings under section 526, and the only limitations upon the amount of the land thus to be acquired are those just stated above.

Now, when it is remembered that the railway company was authorized to select the particular route which it selected, and was authorized to construct its road along the Musselshell river and change the channel of that river when the same would otherwise be crossed by the railroad, in our opinion the changing of the channel, when necessary to make the road secure for life and property, is as much a part of the construction of the road itself within the meaning of this statute, as the boring of tunnels, the construction of bridges, the excavation of cuts or the making of fills or embankments where necessary. Any other construction leads to the absurdity that authority to change the channel of the river is conferred, but the power to make the change is withheld, and such a construction of a statute ⁵⁴⁴ is never to be indulged unless absolutely necessary from the very language employed in the statute.

Having arrived at the conclusion that the changing of the channel of this river is, in contemplation of the statute, a part of the construction of the road itself, it follows, as a matter

of course, from subdivision 7 of section 894, or section 526, when read with subdivision 3, above, that authority to secure land necessary to make such change is conferred, and such land may be secured by condemnation proceedings. While we have not found any authorities directly in point the following illustrate to some extent the views we entertain: 1 Lewis on Eminent Domain, sec. 256; In re New York etc. R. R. Co., 33 Hun, 148; Bigelow v. Draper, 6 N. Dak. 152, 69 N. W. 570; State v. St. Paul etc. Ry. Co., 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3.

As there does not appear to us to have been any error committed by the district court or the judge thereof, the petition filed in this court does not state any facts upon which relief may be granted. The demurrer to the petition is sustained, and the proceedings are dismissed.

Mr. Chief Justice Brantly and Mr. Justice Milburn concur.

A Railroad or Telegraph Company has a discretion in selecting its route and in determining what land it is necessary to condemn in the exercise of its power of eminent domain: Union Pac. R. R. Co. v. Colorado etc. Tel. Co., 30 Colo. 133, 97 Am. St. Rep. 106; Wheeling etc. R. R. Co. v. Toledo Ry. Co., 72 Ohio St. 368, 106 Am. St. Rep. 622, and cases cited in the cross-reference note thereto.

YELLOWSTONE PARK RAILROAD COMPANY v. BRIDGER COAL COMPANY.

[34 Mont. 545, 87 Pac. 963.]

EMINENT DOMAIN—Necessity of Defendant Pleading.—In eminent domain proceedings the defendant should appear by demurrer or answer. If he fails to do so, he has no standing in court for any purpose nor right to be heard in the subsequent proceedings. (p. 551.)

EMINENT DOMAIN—Effect of Defendant not Pleading.—The only effect of a failure by the defendant to appear by demurrer or answer in eminent domain proceedings is to shut him out from participating in the proceedings. The court must, nevertheless, determine whether the use for which the property is sought to be appropriated is a public use, limit the amount taken to the necessities of the case, and ascertain the damages under the procedure and in accordance with the standard provided therein in sections 2220, 2221, and 2224 of the Code of Civil Procedure, (p. 551.)

EMINENT DOMAIN—Failure to Take Default.—If the plaintiff in eminent domain proceedings does not default upon the failure of the defendant to plead, but permits the case to proceed to the making of the order of condemnation as if issues were properly made,

and makes no objection until final hearing in the district court, it will be presumed that the issues were made and properly determined. (p. 551.)

EMINENT DOMAIN—Pleading Damages.—The defendant in eminent domain proceedings is not required to set up his claim for damages, whether general or special, in his pleadings in any form, in order to give the plaintiff notice of their character and amount so that he may be prepared to meet him. (p. 552.)

EMINENT DOMAIN—Measure of Damages.—In determining the amount which the defendants are entitled to recover in eminent domain proceedings, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the plaintiff as a willing purchaser and the defendants were willing sellers. (p. 552.)

EMINENT DOMAIN—Pleading Damages to Land not Taken.—The defendant in eminent domain proceedings is not required specially to plead damages to portions of his land not actually traversed by the railroad of the plaintiff and not described in the petition. (p. 553.)

EMINENT DOMAIN—Damages to Land not Taken.—Where the land of the defendant in eminent domain proceedings is in a compact body, it is clearly within the purview of the court's duty to ascertain what damages have accrued, not only as to the part described in the complaint, but also as to the whole of the body, only a part of which is taken. Such damages are not special in the proper meaning of that term. (p. 553.)

EMINENT DOMAIN—Measure of Damages—Evidence of Offers to Buy.—Evidence in behalf of the plaintiff railroad company in eminent domain proceedings, of offers to purchase lands in the vicinity of the defendant's property indicating an enhancement in values from the building of the road, are inadmissible, when made by persons not parties to nor witnesses in the proceedings. (p. 553.)

APPEAL.—Counsel for the Appellant Cannot Complain in the supreme court of a ruling concerning the admissibility of evidence made by the district court, when he assumes a position in the supreme court exactly the reverse of that which he assumed in the district court. (p. 556.)

EMINENT DOMAIN—Disturbing Verdict on Appeal.—The evidence in eminent domain proceedings may be sufficient to sustain the verdict, although the statements of witnesses are conflicting and unsatisfactory on material points. (p. 557.)

EMINENT DOMAIN—Appeal—Excessive Verdict.—The findings of the jury as to the amount of damages sustained by the defendant by the construction of a railroad through his land will not be disturbed on appeal because excessive, unless so obviously and palpably out of proportion to the injury as to be in excess of what is meant by the expression "just compensation" as used in the constitution. (p. 558.)

W. M. Johnston, for the appellant.

551 BRANTLY, C. J. Proceeding under the statute (Code Civ. Proc., pt. 3, tit. 7, sec. 2216 et seq.), to condemn lands owned by defendants by separate rights, for the use of plaintiff as a right of way. The lands are all used for agricultural

and stock-raising purposes. Those owned by defendant Hanson and wife consist of one hundred and sixty acres in a square body. Two forty-acre subdivisions are cut in two, diagonally, by the line of road from northeast to southwest. The area taken covers three and fifty-eight hundredths acres. The defendant Kuecking has one hundred and fifty-one and one-half acres in a compact body nearly square. The right of way runs through it in the same direction, cutting diagonally three forty-acre subdivisions, taking an area of three and six-tenths acres. The defendants Clark own three hundred and five acres in one compact body. The right of way runs into this tract from the north near the middle of one forty-acre subdivision and passes through it on a curve to the southwest to a point near the line of the western tier of forties on the south line of this forty, and thence due south, cutting two other forty's from north to south, and takes an area of six and three hundred and forty-five thousandths acres. The defendants Dew and wife own one hundred and sixty acres in a parallelogram extending north and south. The right of way runs through them from northeast to southwest on a wide curve, cutting three of the forty-acre subdivisions and taking five and forty-seven hundredths acres. All of these lands lie adjoining in the order named, along Clark's Fork river in Carbon county. Considerable areas of all of them are cultivable and produce grain and alfalfa hay. On the Clark lands is an orchard of thirty acres. The line of road over most of the way ⁵⁵² through them is upon areas usually cultivated. The Clarks are also engaged in sheep raising and use their place as a home ranch. The Hanson and Kuecking lands are almost all cultivated. All of the defendants have water rights, and the taking of the right of way disturbs in a greater or less measure the ditches of the respective owners, and will entail additional labor and expense in changing them as well as the secondary ditches and laterals.

All of the defendants appeared in obedience to the summons issued, except the Bridger Coal Company—as to which, because of an adjustment made by it with plaintiff before the hearing in the district court, the proceeding was dismissed—but filed no answers or other pleadings. The hearing was had and the order of condemnation was made as if issue had been joined by defendants. The commissioners appointed in pursuance of the statute to assess the damages (Code Civ.

Proc., sec. 2220) did so after a hearing and examination of the lands, and made their report. The plaintiff, being dissatisfied with the award, appealed to the district court. (Code Civ. Proc., sec. 2224.) Thereafter, upon a trial, a jury returned a verdict awarding damages as follows: To defendants Hason, for land taken \$214.80, and incidental damages, \$725; to Kuecking, for land taken, \$216, incidental damages, \$725; to Clark and wife, for land taken, \$285.52, incidental damages, \$1,500; and to Dew and wife, for land taken, \$328.20, incidental damages, \$1,295. The jury found that there were no benefits to any of the lands. From the judgment entered upon the verdict and from an order denying a new trial, plaintiff has appealed.

1. At the beginning of the trial, the defendants having assumed the burden of proof, the plaintiff objected to the introduction of any evidence by them "for the reason that no answer, counterclaim or any kind of a claim in damages has been filed in this action." The objection was overruled and plaintiff assigns error.

It is the rule in many of the states that the defendant in condemnation proceedings is not required to make formal appearance ⁵⁵² either by answer or otherwise. The complaint is treated as denied, and the hearing proceeds as if formal issue had been made. This is the rule in Minnesota, Illinois, North Carolina, Iowa, and Arkansas: *Sheldon v. Minnesota etc. Ry. Co.*, 29 Minn. 318, 13 N. W. 134; *Smith v. Chicago etc. Ry. Co.*, 105 Ill. 511; *Carolina etc. R. R. Co. v. Love*, 81 N. C. 434; *Corbin v. Wisconsin etc. Ry. Co.*, 66 Iowa, 269, 23 N. W. 662; *Bentonville R. R. v. Stroud*, 45 Ark. 278. It was formerly the rule in Colorado (*Denver etc. R. R. Co. v. Griffith*, 17 Colo. 598, 31 Pac. 171), but it seems that the rule has been changed by a later statute: *Whitehead v. City of Denver*, 13 Colo. App. 134, 56 Pac. 913.

The procedure in such cases is regulated by the statutes of the particular states, and decisions made under them are generally of little aid in the interpretation of our own statute. In such proceedings the court acquires jurisdiction of the subject matter and the parties by the filing of the complaint in conformity with the requirements of section 2217, and the issuance and service of summons as directed by section 2218. The latter section provides: "The clerk must issue a summons which must contain the names of the parties, a description of the lands proposed to be taken, a statement

of the public use for which it is sought, and a notice to the defendants to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint. Such summons must, in other particulars, be in form of a summons in a civil action, and must be served in like manner upon each defendant named therein at least ten days previous to the time designated in such notice, for the hearing, and no copy of the complaint need be served. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants, upon whom service of summons had been made."

554 Sections 2219 and 2231 provide:

"Sec. 2219. All persons named in the complaint, in occupation of, or claiming an interest in, any of the property described in the complaint, or in the damages, for the taking thereof, though not named, may appear, answer or demur, each in respect to his own property or interest."

"Sec. 2231. Except as otherwise provided in this title, the provisions of part 2 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title."

While sections 2218 and 2219, *supra*, do not require, but permit, an answer to be filed, yet, since section 2231 declares that the provisions of part 2 of the Code of Civil Procedure shall, except where otherwise provided, be applicable and constitute the rules of practice in the proceedings mentioned in this title, it must follow that an appearance, either by demurrer or answer, must be made by the defendants in order to give them any standing in court for any purpose; for section 632, part 2, declares what the summons must contain, in addition to what is required by section 2218, *supra*. Among other things, it must contain a notice that, if the defendant fails to appear or answer, judgment will be taken against him by default for the relief demanded in the complaint. Section 1020 declares that judgment may be had if the defendant fails to answer: (1) In actions arising on a contract, by the clerk upon entry of default; (2) upon a hearing, by the court after the entry of default by the clerk; and (3) in a case where service of summons has been had by publication, upon a hearing by the court after proof of the required publication. Construing these provisions together, it is apparent that the defendant is required to appear and make his de-

fense as in ordinary actions. And, if he fails to appear and save default by one of the modes provided, he has no right to be heard in the subsequent proceedings. This is so notwithstanding the provision of section 2221, which requires the commissioners appointed to assess the damages, to hear the allegations and evidence of all persons interested. ⁵⁵⁵ The latter provision evidently contemplates cases where the parties defendant are not in default, for, if they must, notwithstanding their default, be heard by the commissioners, they may appeal (section 2224) and still have a jury trial as to the amount of damages—a situation which, in view of the provisions applicable to ordinary actions, would be absurd.

But this conclusion does not involve the idea that the court is not bound to proceed in conformity with the other requirements of this title in the performance of its duties. The only effect of a default is to shut out the defendants from participating in the proceedings. The court must, nevertheless, determine whether the use for which the property is sought to be appropriated is a public use, limit the amount taken to the necessities of the case, and ascertain the damages under the procedure and in accordance with the standard provided therefor in sections 2220, 2221, and 2224.

But, while this is true, the plaintiff in this case may not now be heard to say that he has been prejudiced by the ruling complained of. It failed to take default against the defendants. They were permitted to appear at the hearing when the order of condemnation was made, plaintiff's counsel thinking, doubtless, that they were not required to file any pleading. No fault was found with any of the proceedings until the opening of the trial on appeal. Upon inspection of section 2217, *supra*, it will be seen what issues may be made and tried upon the pleadings. The case having proceeded to the making of the order of condemnation without objection, as if issues had properly been made, it must be presumed that they were made, and, since there is no complaint of any error in regard to them, it must be presumed that they were properly determined.

But counsel says that the defendants' claims for damages should have been set up in their answers by way of counterclaim, thus giving plaintiff notice of their character and amount, so that it could be prepared to meet them. The answer to this contention is that there is no provision in the title touching condemnation proceedings, requiring defend-

ants to set up their ⁵⁵⁶ claims for damages in their pleadings in any form. And when we examine the provisions of part 2 relating to the forms of pleadings and declaring what may be set up as counterclaims, we find that they clearly exclude damages awarded in such cases. The counterclaim permitted by section 691 must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of a designated class of causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant or of one or more defendants between whom and plaintiff a separate judgment may be had in the action. It must also be matured and exist at the time the action is brought.

When this proceeding was commenced, the defendants had no cause of action against the plaintiff, and a recovery of the damages to which they are entitled tends in no way to defeat plaintiff's right to have the land condemned for a roadbed, whatever may be the amount of recovery. Indeed, the purpose of the whole proceeding is to enforce the sale of a portion of defendants' lands to plaintiff, to ascertain the damages—the purchase price—and to compel payment of them. And, since the statute does not require, either expressly or by implication, that the defendants must plead their damages or present any other issues than those which go to the truth of the petition itself, they may not be required to do so, no matter whether the damages are general or special, and, in determining the amount which they are entitled to recover, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the defendants as a willing purchaser and the defendants were willing sellers: *Mississippi etc. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Webster v. Kansas City etc. Ry. Co.*, 116 Mo. 114, 22 S. W. 474; *Denver etc. R. R. Co. v. Griffith*, 17 Colo. 598, 31 Pac. 171. In other words, it must ascertain the market value of the lands after the right of way is taken.

2. Objection was made to certain evidence tending to show damage to portions of defendants' lands not actually traversed ⁵⁵⁷ by the railroad and not described in the petition. It is said now that the claims for damages in this behalf should have been specially pleaded, and plaintiff cites several Illinois cases in support of his contention; among them, *Stetson v. Chicago etc. R. Co.*, 75 Ill. 74; *Chicago etc. R. Co. v. Hop-*

kins, 90 Ill. 316; Johnson v. Freeport etc. Ry. Co., 111 Ill. 413. It will be seen on examination of these cases, however, that the Illinois statute permits the defendant in such cases to file a cross-petition in order to set forth more fully and accurately his claim. But our statute contains no such provision. Besides, as we have seen, the lands of the different defendants in this case are all compact bodies, and it is clearly within the purview of the court's duty to ascertain what damages have accrued, not only as to the part described in the complaint, but also to the whole of the body, a part of which only is taken. Such damages are not special in the proper meaning of that term: North Pac. R. Co. v. Reynolds, 50 Cal. 90; Sheldon v. Minnesota etc. R. Co., 29 Minn. 318, 13 N. W. 134; Sherwood v. St. Paul etc. R. Co., 21 Minn. 122; Fayetteville etc. Ry. Co. v. Hunt, 51 Ark. 330, 11 S. W. 418. The plaintiff should not, after describing only so much of the entire tract as suits its convenience, be heard to say that the detriment to the part not described is special, and must be pleaded by the defendants in order to make it incumbent upon the commissioners or the court to consider defendants' claims.

3. The plaintiff, for the purpose of showing that all the lands along Clark's Fork river had been enhanced in value by the building of the road, tendered evidence to prove that offers had been made by various persons to the owners of selected parcels of land in the vicinity of the lands of defendants of one hundred dollars per acre. All these offers but one, which will be hereafter noticed, arose out of negotiations between persons none of whom are parties to this proceeding or were witnesses on the trial. The evidence having been excluded, counsel for plaintiff insists that the ruling was erroneous. There is no merit in this contention. The offer was an attempt to get ⁵⁵⁸ before the jury hearsay declarations of third parties as to value not supported by oath, without the right of cross-examination by the defendants. The right mode of proving value is to take the sworn opinions of those who are shown to be competent to give opinions on the subject, and let them be cross-examined as to the foundation of their opinions, their means of knowledge and the motives prompting them. Furthermore, the value of such evidence depends upon the determination of so many collateral issues that it cannot be relied on with safety. With reference to it the supreme court of New York has well said: "Its value

depends upon too many circumstances. If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purposes of a cause, and the bad faith in which they were made would be difficult to prove. The reception of evidence of private offers to sell or purchase stands upon an entirely different footing from evidence of actual sales between individuals or by public auction, and also upon a different footing from bids made at auction sales: *Young v. Atwood*, 5 Hun, 234. The reception of this class of evidence would multiply the issues upon questions of damages to an extent not to be tolerated by courts aiming to practically administer justice between litigants': *Keller v. Paine*, 34 Hun, 167.

In *Hine v. Manhattan Ry. Co.*, 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591, the inquiry was: What was the market value of the premises in controversy prior to the building of the defendant's railroad? On the trial in the lower court evidence of offers made to the owner had been received. The appellate court held this error, on the ground that it was objectionable as hearsay, and on the further ground stated by the supreme court in *Keller v. Paine*, 34 Hun, 167. On both the grounds we think the ⁵⁵⁰ evidence was properly excluded. The rule stated in these cases has been followed quite generally by the courts, whether the particular offer was made to third persons for other lands in the vicinity or to a party for the lands in question, either by third persons or the condemning party: *Chicago etc. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. 210; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Davis v. Charles River Branch R. Co.*, 11 Cush. (Mass.) 506; *Selma etc. Ry. Co. v. Keith*, 53 Ga. 178; *Parke v. City of Seattle*, 8 Wash. 78, 35 Pac. 594; *Lehmiecke v. St. Paul etc. R. Co.*, 19 Minn. 464 (Gil. 406); *Concord R. Co. v. Greely*, 23 N. H. 237; *Watson v. Milwaukee etc. Ry. Co.*, 57 Wis. 332, 15 N. W. 468; 2 *Lewis on Eminent Domain*, 446.

The other offer referred to above was made to defendant Clark himself of forty dollars per acre of all the land owned by himself and wife, which Clark signified his willingness to accept. This evidence was admitted without objection. Un-

der the circumstances plaintiff cannot complain, for, whether right or wrong, the ruling of the court was in its favor.

4. In assignments 8, 10, 11, 12, 13 and 14 error is alleged in that the court permitted different witnesses to give their opinions as to the damage sustained by the defendants to lands not taken, after deducting all benefits. The argument is that, since the statute (Code Civ. Proc., secs. 2221, 2224) requires the commissioners in the first instance to assess the damages and benefits separately, the witnesses should have been required to state the damages and benefits separately, and, since this was not done, the evidence confused rather than aided the jury.

There is much conflict in the decisions of the courts as to whether a witness should be allowed to state his opinion as to the amount of damages or benefits accruing to the defendant in condemnation proceedings. The cases are collected in the footnotes to section 476 of Mr. Lewis' work on Eminent Domain. The conflict of opinion, however, seems more apparent than real, for in all the states the opinions of witnesses must be resorted to to determine (1) the value of the land taken; (2) the detriment, if any, to the portion not taken, or, in other words, the value of ⁵⁰⁰ that not taken; and (3) the benefits, if any, to the portion not taken. If the witnesses state the items separately, it requires only an arithmetical calculation to reach a determination of the net result. Does it really matter whether this is done by the witnesses or by the jury? When the witness has stated the facts upon which his opinion is based—thus furnishing the jury the means of judging of its trustworthiness—the mental process necessary to arrive at the net result may as well be that of the witness as of the jury. In effect, the expression of opinion as to the items of value is an expression of opinion as to the net result.

After commenting on the diversity of opinion on this subject, Mr. Lewis says: "The law is supposed to discourage all indirect and circuitous methods. Why a witness should not be allowed to state at once and directly his opinion of the amount of damages or benefits in answer to a single question, instead of stating it indirectly in answer to two questions, we are unable to perceive. The distinction attempted to be maintained between the two methods is without any substantial difference and must eventually be abandoned": 2 Lewis on Eminent Domain, sec. 436.

In this case the witnesses were questioned fully as to the bases of their opinions. The jury, under the instructions of the court, assessed the damages as required by the statute, finding the items well within the extreme limits of the testimony. Even if, therefore, it be conceded that the questions were not technically correct in form, we do not see how any prejudice was suffered.

5. On redirect examination the following question was asked one of the defendants' witnesses: "I will ask you if Mr. Dew's land has increased in value to any greater extent than any other lands of similar character and quality of his in the Clark's Fork valley since the building of the railroad?" An objection that this was immaterial testimony and was not proper re-examination was overruled, whereupon the witness answered that it had not. While this ruling is assigned as error, the argument in the brief is devoted to the question whether or not an increase in the market price of defendants' lands, generally or specially, by ⁵⁶¹ reason of the building of the road should not be set off against any damages accruing to the portion not taken, counsel arguing that the setoff should be allowed. Whether the question presented by counsel should be resolved in favor of plaintiff we need not now decide. If the setoff should be allowed, the evidence was material, for, if the plaintiff had a right to a setoff on account of the alleged enhancement of value, the defendants had the right to show that there was none. The argument of counsel tends to support the view that it was material. Evidently the court thought that it was, for the instructions submitted to the jury were formulated on the theory that credit should be allowed for such benefits. In any event, counsel has assumed a position in this court which does not entitle him to complain, because it is exactly the reverse of the position which he assumed in the district court.

6. Complaint is made that the instructions were not sufficiently specific in laying down the rule to be pursued by the jury in assessing the damages. Considering the charge as a whole it was as fair as the plaintiff could ask. That the jury were not misled is clear from the fact that they followed the rule laid down in the statute, finding separately upon the different items of damages and benefits as is therein prescribed. While paragraph 21, of which particular mention is made, might have been stated with more clearness, it follows the statute in substance and is correct.

Criticism is made of paragraph 24 of the charge, because the court therein told the jury that they must not consider the award theretofore made by the commissioners, but should confine themselves exclusively to the testimony of the witnesses examined at the hearing. This was clearly correct, for the reason that the award was not introduced in evidence. The only reference to it was made during the cross-examination of two of the commissioners who were sworn as witnesses at the trial. Being asked as to the amounts fixed by them in their award, they stated amounts which agreed with those fixed by them at the trial. The trial was *de novo* as to the damages. The award of the commissioners ⁵⁶² could not be competent for any purpose, except to impeach the statements of those commissioners who were sworn as witnesses, in case their opinions expressed at the trial differed from their findings. The caution contained in this paragraph was perhaps not necessary, but it is not erroneous.

7. It is said that the evidence is not sufficient to sustain the verdict. It would be a bootless task to take up and analyze the evidence and undertake to reconcile the statements of the various witnesses. Most of them were practical farmers and business men who knew the lands in controversy, and, while their statements are conflicting and unsatisfactory upon material points, we cannot say that the evidence all together does not give substantial support to the findings of the jury. That this court must, under these circumstances, accept them as final is too well settled to permit further discussion.

8. Finally, it is said that the award of the jury for damages to the lands not taken is excessive, as is apparent from the fact that the evidence conclusively shows that the lands of all the defendants have been increased in value by the building of the road, because it not only furnishes easier access to market, but also, for the same reason, it makes them available for other products for which until the road was built there was no market. This matter was agitated at the trial, and there was a sharp conflict in the opinions of the witnesses as to what effect upon the value of the lands along the line of road and in the community generally the building of the road has had. The question was fairly submitted to the jury. They found that there were no benefits. Their findings were re-examined by the court upon the motion for a new trial. While the verdict is, in case of each defendant, for a larger sum than the amount awarded by the commis-

sioners, the jury might have found a larger amount and still kept well below the highest estimate of any witness. The fact that they found that there were no benefits, though some of the witnesses were of a contrary opinion, does not of itself conclusively show that they were controlled by sentiments of passion and prejudice. It merely shows that they regarded the ⁵⁶³ opinions of the defendant's witnesses as more trustworthy than those of plaintiff.

It may be conceded that the building of the road has improved market facilities for all the defendants. Yet this does not necessarily compel the conclusion that the market value of their lands has been appreciably enhanced, even though it should be accepted as the correct doctrine that such enhancement of value may be offset against the damages. The real inquiry is "whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case, and it will be so presumed, unless the verdict is so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them": 13 Cyc. 122.

Upon the evidence before us we cannot say that the findings of the jury in the particulars referred to are so obviously and palpably out of proportion to the injury done the defendants as to be in excess of what is meant by the expression "just compensation" as used in the constitution.

The plaintiff has, we think, had a fair trial, and the judgment and order must be affirmed.

Mr. Justice Milburn and Mr. Justice Holloway concur.

The Defendant in Condemnation Proceedings, according to the practice in some jurisdictions, is not required to make formal appearance by answer: Bentonville R. R. Co. v. Stroud, 45 Ark. 278; Henry v. Centralia etc. R. R. Co., 121 Ill. 264, 12 N. E. 744; Sheldon v. Minneapolis etc. Ry. Co., 29 Minn. 318, 13 N. W. 134; Denver etc. R. R. Co. v. Griffith, 17 Colo. 598, 31 Pac. 171; Carolina Cent. Ry. Co. v. Love, 81 N. C. 434.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

CLANCY v. BARKER.

[71 Neb. 83, 98 N. W. 440, 103 N. W. 446.]

INNKEEPERS—Duties.—By the implied contract between a hotel-keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is a further implied undertaking on his part that the guest shall be treated with due consideration for his safety and comfort. (p. 562.)

INNKEEPERS—Duties.—The Duties of a hotel-keeper to his guests are similar to the common-law obligation of a common carrier to his passengers. (pp. 562, 563.)

INNKEEPERS—Trespass by Servant.—A trespass committed upon a guest in a hotel by a servant of the proprietor is a breach of the implied undertaking of the latter to care for the comfort and safety of the guest, rendering such proprietor or manager liable in damages, whether such servant was at the time of the trespass actively engaged in the discharge of his duties or not. (p. 564.)

EVIDENCE—Admissions—Res Gestae.—It is not within the scope of the authority of manager of a hotel to bind his employer by admissions concerning a trespass committed by a servant of the hotel, when such admissions are made the day after the commission of the trespass. They are not admissible as part of the *res gestae*. (p. 565.)

MASTER AND SERVANT—Tort of Servant.—A master is not liable for the torts of his servant, unless they are connected with his duties or within the scope of his employment. (p. 566.)

INNKEEPERS—Assault by Servant.—An innkeeper must protect his guests while in the hotel from the assaults of a servant employed therein, whether actually engaged in his duties at the time or not, and in case of injury from such assault, the hotel-keeper must respond in damages. (pp. 566, 567.)

J. O. Yeiser, for the plaintiff in error.

W. A. Redick and W. J. Connell, for the defendants in error.

⁸⁴ ALBERT, C. The plaintiff in his petition filed in the district court alleges, in effect, that the defendants were the proprietors and operated a hotel in the city of Omaha; that on the twelfth day of January, 1902, he entered such hotel with his wife and infant son for a temporary sojourn therein, whereupon he and the said members of his family were received as guests in said hotel by the defendants; that afterward, and while they were thus guests in said hotel, the plaintiff's infant son entered a room of the hotel to speak or play with a porter or servant of the defendants, who, at the time, was in said room. Then follow these allegations: "That the said porter and servant of defendants in said hotel, in said capacity at said time, violated all obligations of hospitality and patience due from said defendants, through said servants, to said infant guest, and the defendants thereby violated their agreement, duty and obligation of law with, and to, the plaintiff by the following conduct, to wit: The said porter, in attempting to have said infant son of plaintiff leave said room and corridor, where defendants did not want him, as instructed, and retire to his mother's room, and to have said infant cease his childish play and pretended annoyance, carelessly, imprudently, rashly, unnecessarily, negligently and foolishly picked up a revolver and pointing it at said infant, said: 'If you handle anything, this is what I will do to ⁸⁵ you,' or similar words calculated to frighten the said infant out of his natural and childish playfulness and prevent his touching any of defendants' property, or being about said room or the halls; that the said infant threw up his hands when thus frightened and assaulted, and, by some means unknown to this plaintiff, the said pistol was carelessly and negligently discharged by the said defendants' servant as aforesaid."

The petition contains the usual allegations as to damages.

The defendants by their answers admit that the defendant administrator and corporation were the proprietors of the hotel and were operating it as alleged in the petition; that the plaintiff, his wife and infant son were received into said hotel as guests, at the date alleged in the petition, and that, while the plaintiff and the said members of his family were thus guests at the hotel, the son was seriously injured. But they specifically deny that the person described in the petition as their porter or servant was in their employ at the time the injury occurred, and that he was on duty, or

in the performance of any duty, as porter or servant of the defendants at such time. They also specifically deny that the defendant, George E. Barker, was one of the proprietors of the hotel, or in any way interested in the same, or the operation thereof, save as president of the defendant corporation.

The evidence adduced by the plaintiff sufficiently shows that the plaintiff, his wife and infant son became guests at the hotel, intending to remain but a short time; that about three days after they were received in the hotel, and while they were guests therein, a servant of the proprietors of the hotel, who had waited upon the plaintiff and the members of his family during their stay at the hotel, was playing a harmonica in a room which was not one of those assigned to the plaintiff or any member of his family; that the plaintiff's son, attracted by the music, entered the room, the door of which was open; that thereupon the servant who had been playing the ⁸⁶ harmonica took up a revolver and pointed it at the boy, saying, "See here young fellow, if you touch anything, this is what you get." The revolver, by some means, was then discharged, the ball striking the boy, destroying one of his eyes and inflicting upon him other serious injuries. While there is no direct evidence that the person who inflicted the injuries was in the employ of the proprietors of the hotel, the evidence shows that he waited on the guests, carried water to their rooms and rendered such other services as are usually rendered by servants of a certain class about a hotel, and is amply sufficient to warrant a finding that he was the servant of the proprietors, and, for the purposes of this case, would have made him such, perhaps, in the absence of a contract of employment. There is no evidence tending to connect the defendant George E. Barker with the operation of the hotel.

At the close of plaintiff's case the court directed a verdict for the defendants, and from a judgment rendered on such verdict the plaintiff brings the record here for review.

The defendants insist that the plaintiff, having failed to allege that the servant willfully or maliciously inflicted the injury, it was incumbent on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendants owed the plaintiff. We think they overlook the theory upon which this action was brought and prosecuted. The plaintiff by

his petition and evidence obviously intended to commit himself unreservedly to the theory that his cause of action is *ex contractu*. A contract is alleged in the petition, the wrongful acts of the servant, which resulted in injury to the boy are alleged, not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract and consequent damages.

This brings us at once to the question whether the act of the servant, resulting in the injuries complained of, constitutes ⁸⁷ a breach of the implied contract between the plaintiff and the proprietors of the hotel for the entertainment of the former and his family. By the implied contract between a hotel-keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is implied on his part the further undertaking that the guest shall be treated with due consideration for his safety and comfort: *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779; *Jencks v. Coleman*, 2 Sum. 221, Fed. Cas. No. 7258. In *Commonwealth v. Power*, 7 Met. (Mass.) 569, 41 Am. Dec. 465, Shaw, C. J., said: "An owner of a steamboat or railroad in this respect is in a condition somewhat similar to that of an inn-keeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course, he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

The foregoing language is quoted with approval in *Bass v. Chicago etc. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495. Substantially the same language is employed by the court in *Dickson v. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440, 34 N. E. 506, 24 L. R. A. 483, 488. See, also, *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Russell v. Fagan*, 7 Houst. (Del.) 389; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239. The foregoing also show that the duties of a hotel-keeper to his guests are regarded as similar to the common-law obligation of a common carrier to his passengers. As regards the duty of a common carrier to his

passengers, in *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224, the court said: "As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and, during its performance, to care for his comfort and safety. The duty of protecting the personal safety of the passenger and promoting, ^{ss} by every reasonable means, the accomplishment of his journey is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it."

To the same effect are the following: *Pittsburg etc. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Chamberlain v. Chandler*, 3 Mason, 242, Fed. Cas. No. 2575; *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Chicago etc. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Southern Kansas R. Co. v. Rice*, 38 Kan. 308, 5 Am. St. Rep. 766, 16 Pac. 817. An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel-keeper as regards his duties to his guests. Those duties spring from the implied terms of his contract and a failure to discharge them, and while it may in some instances amount to a tort, it amounts in every instance to a breach of contract.

If, then, the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limited to the proprietor himself. As a rule, he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as

guests; and if they be not thus treated there is a breach of the implied contract, whether the lack of such treatment is the result ^{so} of some act or omission of the proprietor himself or of his servant or servants.

Neither do we deem it material whether the servant, at the time of the injury, was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor and an inmate of the hotel; his duty as to the treatment to be accorded the guests of the hotel was a continuing one, and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224, is peculiarly applicable to this point:

"The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it, when the blow was struck. The blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

It is equally immaterial to this case, we think, whether the shooting was accidental or willful. The servant in pointing a loaded gun at the boy committed a trespass, and as a result of such trespass inflicted serious and permanent injuries on the child. His acts, therefore, constituted a breach of the implied undertaking of his employers to treat the plaintiff and his family with due consideration for ^{so} their safety and comfort, for which breach his employers are liable in damages.

We are aware that there are cases holding contrary to the foregoing conclusion, but they do not seem to us to be based

on sound reasons, nor upon just considerations of public policy, and are contrary to the weight and trend of modern authority.

The plaintiff offered to prove by one of his witnesses that the day following the accident one Mr. Bowman, the manager of the hotel, told the witness "that he had told the boys [referring to the porters and bellboys of the hotel] time and again to keep the kid [meaning the plaintiff's son] out of the elevator, halls and rooms of the hotel, and to keep him in his mother's room." The offer was rejected, and the plaintiff contends that the ruling of the court in that behalf is erroneous. We do not think so. It was not within the scope of the authority of the manager to bind his employer by the admission or declaration sought to be proved, and it was too remote in point of time and too detached from the injury to be admissible as a part of the *res gestæ*: *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, 47 N. W. 638; *Commercial Nat. Bank v. Brill*, 37 Neb. 626, 56 N. W. 382; *Collins v. State*, 46 Neb. 37, 64 N. W. 432; *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50.

As to the defendant George E. Barker, as we have seen, there is no evidence which would warrant a verdict against him. Hence, so far as he is concerned, the judgment of the district court is right, but as to the other defendants, it is recommended that the judgment be reversed and the cause remanded for further proceedings according to law.

Barnes and Glanville, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court, as to the defendant George E. Barker, is affirmed and, as to the other defendants, the judgment is reversed and the cause remanded for further proceedings according to law.

Judgment accordingly.

ON REHEARING.

¶⁹¹ SEDGWICK, J. Since the filing of the former opinion in this case (*ante*, p. 559), the question principally discussed therein, and arising out of the same transaction, has been decided by the United States court of appeals for this circuit: *Clancy v. Barker*, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653. The opinion of that court prepared by Judge Sanborn strongly states the reasons which led the majority of the court

to the conclusion that the hotel company ought not to be held liable. In a dissenting opinion, Judge Thayer upholds the views expressed in the former opinion of this court.

1. The first ground urged by counsel for holding the defendant liable we think is satisfactorily discussed in the majority opinion of that court. This relates to the doctrine of respondeat superior derived from the relation of master and servant. If there had been evidence showing that it was the duty of the employés of the hotel to prevent children from entering and playing in rooms which were not assigned to them, it might, perhaps, be contended that the boy Lacy was acting within the scope of his employment when the accident occurred. The evidence offered as tending to show that he was so acting was properly excluded, as shown in the former opinion, and it does not appear that there was any other evidence in the record upon this point.

⁹² 2. Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employés, by which his guests are injured while they are in the hotel and are in his care, is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employés of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel-keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier, of course, is bound to use extraordinary care or, as is sometimes said, the utmost care for the safety of his passengers. The business engaged in is a dangerous one, and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel-keeper offers accommodations for strangers who are not acquainted with his employés and who have no voice in their selection. He undertakes to provide them with suitable accommodations and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality,

which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping-car have charge of the occupants of the car and have control of their conduct and behavior? Surely, if it is different in degree from the control that the hotel-keeper has over his guests, it is not much different in kind. The hotel-keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so; ⁹³ and is under obligation to select such employés as will look after the safety and comfort of his guests, and will not commit acts of violence against them so far as is reasonably within his power. It would seem that to relieve him from liability for injuries done to his guests by his employé, upon the sole ground that the employé was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar conditions, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply under modern conditions to the relations between an innkeeper and his guests.

Notwithstanding the great respect due to the court which has reached a contrary conclusion in *Clancy v. Barker*, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653, we conclude that our former decision ought to be adhered to.

Former judgment adhered to.

Mr. Justice Barnes Dissented and expressed the opinion that the defendants should not be held liable for the injury complained of. He maintained that the liability of an innkeeper is unlike that of a common carrier, in that the former is not an insurer of the safety of persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employés; that the true rule to be applied in the principal case is that of the common law, namely, that an innkeeper is not an insurer of the safety of his guest against injury, and that his obligation is limited to the exercise of reasonable care for the safety, comfort, and entertainment of such guest, and that an innkeeper is not liable for an assault and battery committed on a guest by one of his servants, especially when the assault is not within the line of the servant's duty, and is not advised or countenanced by the master. In support of this view, Judge Barnes cited the following

cases: *Rahmel v. Lehdorff*, 142 Cal. 681, 100 Am. St. Rep. 154, 76 Pac. 659, 65 L. R. A. 88; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148; *Sheffer v. Willoughby*, 163 Ill. 518, 54 Am. St. Rep. 483, 34 L. R. A. 464, 45 N. E. 253, 34 L. R. A. 464; *Gilbert v. Hoffman*, 66 Iowa, 205, 55 Am. Rep. 263, 23 N. W. 632; *Sneed v. Moorhead*, 70 Miss. 690, 13 South. 235; *Stanley v. Bircher's Exr.*, 78 Mo. 245; *Overstreet v. Moser*, 88 Mo. App. 72; *Stott v. Churchill*, 15 Misc. Rep. 80, 36 N. Y. Supp. 476; *Weeks v. McNulty*, 101 Tenn. 495, 70 Am. St. Rep. 693, 48 S. W. 809, 43 L. R. A. 185.

For Recent Authorities on the Liability of Innkeepers for assaults upon their guests, see Rahmel v. Lehdorff, 142 Cal. 681, 100 Am. St. Rep. 154, and cases cited in the cross-reference note thereto; *Anderson v. Diaz*, 77 Ark. 606, 113 Am. St. Rep. 180.

BROWN v. BROWN.

[71 Neb. 200, 98 N. W. 718.]

WILLS—Omitted Child—Evidence—Burden of Proof.—Under a statute providing that "when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate," parol evidence is admissible to show whether such omission was unintentional, and the burden is on the pretermitted child to establish such fact. (p. 572.)

TRIAL—New Parties.—Although a statute provides for intervention before trial only, yet the court has power to bring other parties before it, even after trial, when satisfied that their presence as parties is necessary to a proper determination of the case. (p. 575.)

PRACTICE—Harmless Error.—Error in overruling a demurrer is harmless if the pleading assailed is thereafter amended, and the case submitted and determined on the amended pleadings. (p. 577.)

TRIAL—Amendment of Petition After Trial may be permitted and the case reopened for the trial of the issues tendered by such amendment when necessary to a proper determination of the case. (p. 577.)

WILLS, PROBATE OF—Conclusiveness as to Mental Capacity.—The decree of the proper court admitting a will to probate is conclusive on all parties as to its due execution and as to all questions affecting the competency of the testator to make a will. (p. 578.)

Hainer & Smith, for the plaintiffs in error.

J. H. Edmondson, M. F. Stanley and O. A. Abbott, for the defendants.

²⁰¹ ALBERT, C. On the eighteenth day of February, 1901, an instrument purporting to be the last will and testament of Henry S. Brown, deceased, was admitted to probate in the county court of Hamilton county. The testator was the father of thirteen children, ten of whom survive him. Three of his sons, George A., Hamilton, J., and Albert, H., died before the execution of the will. The first left four children, namely, Carrie, Nellie, Ethel and George; the second left three, Jennie, Ettie and Charles; the third left two, George and Mabel. The will, after making provision for the payment of the debts of the testator and for the support of the surviving widow, contains the following provisions:

"I give and bequeath one hundred dollars (\$100) each to the following, my grandchildren, to wit, Carrie Brown, Nellie Brown, Ethel Brown and George Brown, and being children of my deceased son, George W. Brown; and to Jennie Brown and Ettie Brown, being children of my deceased son, Hamilton J. Brown; and being in the aggregate to my said six grandchildren the sum of six hundred dollars (\$600). . . . After the payment of all my just debts, and the payment of said legacies to my said wife and grandchildren, and the setting off to my said wife of said real estate hereinbefore specifically mentioned, I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, of whatsoever it may consist and wheresoever situated, to such of the children of my own body begotten as shall survive me. Such surviving children to share the said residue of my estate share and share alike."

After the final report of the administrator with the will annexed had been filed, and before a hearing thereon, George and Mabel Brown, children of the deceased son, Albert H. Brown, by their next friend, filed a petition in the county court alleging, among other things, that "neither they nor their deceased father were mentioned ²⁰² by name in said will," but "that they were included in the general designation of 'children of my own body begotten.'" The prayer is as follows: "Wherefore your petitioners pray that the court construe and declare the true meaning and intent of said testator, and that your petitioners may be adjudged and decreed to be included under the words 'children of my own body begotten' and entitled to an undivided one-eleventh (1/11) part of the estate of said Henry S. Brown, deceased, as residuary devisees, subject to the other provisions in said will contained,

and, in the event the court should determine that your petitioners were not included, or intended to be included, under the words, 'children of my own body begotten,' that they may be adjudged and decreed to be entitled to an undivided one-thirteenth (1/13) part of the entire estate of the said Henry S. Brown, deceased, subject only to the dower and homestead rights of the widow of the testator, Angelina Brown."

The court found against the petitioners, and dismissed their petition; an appeal was taken to the district court. In the meantime, on the eighth day of January, 1902, five children of the testator commenced a suit in the district court against the other five for a partition of the real estate of which the testator died seised, which proceeded to a final decree confirming the respective shares of the parties to that suit to such real estate. There were other parties to the suit, but it is unnecessary to mention them. A sale had been ordered, and notice thereof published. On March 22, 1902, and about two hours before the time fixed for the partition sale, George and Mabel Brown, children of the deceased son, Albert H. Brown, and petitioners in the proceeding brought in the county court for a construction of the will, filed a petition of intervention in the petition suit, which, save in some minor details not necessary to notice at this time, was substantially the same as that filed by them in the proceeding for a construction of the will. The plaintiffs and defendants ²⁰³ in the partition suit joined in a motion to strike the petition of intervention from the files, for the reason that the application for intervention was too late, which motion was overruled. The plaintiffs and defendants then joined in a demurrer to the petition of intervention, which was also overruled. The plaintiffs and defendants then filed an answer to the petition of intervention, in which, after making a general denial, they set out the proceedings had for the probate of the will, insisting that, as no proceedings had been had or instituted to reverse, vacate or modify the decree admitting the will to probate, the questions raised by the petition of intervention were *res judicata*. The interveners filed a reply which amounts to a general denial. In the meantime the referees had made a sale of the lands, and on the eighth day of May, 1902, on the motion of all the parties, including the interveners, the sale was confirmed, and the referees were ordered to distribute the proceeds, except the sum of two thousand dollars, which they were directed to hold to await

the final decision of the court on the matters in litigation between the interveners and the other parties to the suit. Afterward four of the plaintiffs, children of the testator, in open court withdrew all opposition to a decree in favor of the interveners, and asked the court to direct the payment to the interveners out of the amount retained in the hands of the referees, of such portion thereof as should be deducted proportionately from the shares of the plaintiffs joining in such request, and the court entered an order in accordance with their request. Afterward the appeal from the county court in the proceeding to construe the will and the suit between the interveners and the other parties to the partition suit having been consolidated, the issues in both were tried on the same evidence. The court held against the interveners on their contention as to the construction of the will, but held further that they had been unintentionally omitted from the will by accident or mistake, and were therefore entitled to a share of the estate by virtue of the provisions of section 149, chapter 204 204 23 of the Compiled Statutes (Annotated Statutes, 5014), relating to the omission of children or the issue of any deceased child from a will. Thereupon the interveners, over the objections of their opponents, were given leave to amend their petition of intervention in such a way as to make the allegation, "neither they nor their deceased father were mentioned by name in said will," read, "neither they nor their deceased father were mentioned by name in said will, but these petitioners were omitted therefrom by mistake or accident, unless they were included in the general designation of 'children of my own body begotten.' " It is unnecessary to go into details as to what followed the amendment. Eventually the parties were permitted to introduce evidence on the issues tendered by such amendment, and the court found in favor of the interveners, and entered a decree directing that the proportionate share should be paid from the proceeds of the sale retained by the referees. The defendants bring the record here for review on error.

An examination of section 149, *supra*, will dispose of some of the questions raised in this case; it is as follows: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child

shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section."

One question arising under this section is, whether parol evidence is admissible to show whether the omission was intentional. The decisions of other courts, based on statutes of a similar character, are in conflict. *Wilson v. Fosket*, 6 Met. (Mass.) 400, is a leading case in the affirmative. This case is reported and annotated in 39 Am. Dec. 736. To the same effect are the following: *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Stebbins v. Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; *Moon v. Estate of Evans*, 69 Wis. 667, 35 N. W. 20. In the last case, the doctrine appears to ²⁰⁵ have been applied without question. Such evidence is held inadmissible in the following cases: *Estate of Garraud*, 35 Cal. 336; *In re Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446. It is not easy to reconcile the doctrine of either line of authorities with the rule which requires the courts to give effect to the intentions of the testator because, in either case, a finding that the omission of a child or grandchild from the will was unintentional, is equivalent to a finding that the will does not reflect the intentions of the testator. When such fact is once established, what his intentions actually were becomes a matter of conjecture, because, had he made provision in the will for the pretermitted child, such provision of necessity would have resulted in a modification of the provisions made for the objects of his bounty. Just how he would have modified the other bequests or devises to make provision for such child can rarely, if ever, be ascertained with certainty. However that may be, we are disposed to follow the cases holding that parol evidence is admissible to show whether the omission was intentional. In addition to the reasons given in cases supporting that doctrine, we find an additional reason in the language of our section 149, and the section immediately preceding it. Section 148 provides: "When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, . . . unless it shall be apparent from the will that it was the intention

of the testator that no provision should be made for such child."

The foregoing provision shows that the lawmakers worded the section under consideration advisedly, and with a view to express their meaning fully and clearly. If they saw the importance of limiting the evidence of the intentions of the testator in regard to posthumous children to the will itself, it is not at all likely that in the next section they would have left it a matter of speculation, ²⁰⁶ whether such proof should be limited to the instrument itself, or might be supplied by parol. We are satisfied that whether the omission was intentional or unintentional is a question of fact, which may be established by parol testimony.

Another question which has arisen under statutes similar to ours is whether the burden of proof is upon the pretermitted child or grandchild to show that he was unintentionally omitted from the will, or whether it is upon those claiming that his omission was intentional. The Massachusetts statute, for present purposes, may be said to be substantially the same as our section 149, save that, instead of the clause, "and it shall appear that such omission was not intentional, but was made by mistake or accident," the Massachusetts statute reads, "unless it shall appear that such omission was intentional and not occasioned by mistake or accident." In *Ramsdill v. Wentworth*, 106 Mass. 320, it was held that the clear inference from the use of the words, "unless it appears," etc., is that the burden of proof is on those claiming that the omission of the child from the will was intentional. The difference between the Massachusetts statute and our own is important on the question of the burden of proof. There, the child or grandchild omitted from the will receives a distributive share, unless it appear that the omission was intentional, and not occasioned by mistake or accident; here, he receives such share, if it appear that his omission from the will was not intentional, but was made by mistake or accident. It seems to us that, under our statute, the inference that the burden of proof is on the pretermitted child is as clear from the words, "and it shall appear that such omission was not intentional, but was made by mistake or accident," as that drawn by the court in *Ramsdill v. Wentworth*, 106 Mass. 320, from the words, "unless it appears," etc. Under section 149, a child omitted from the will must show two

things: First, that he was omitted therefrom; second, that such omission was not intentional. It is only when he has shown both of those facts that he ²⁰⁷ is entitled to a share of the estate. The omission to provide for the child in the will, though unintentional, furnishes no ground for objecting to the probate of the will, but the remedy is after probate and by construction: *Doane v. Lake*, 32 Me. 268, 52 Am. Dec. 654; *Schneider v. Koester*, 54 Mo. 500; *Pearson v. Pearson*, 46 Cal. 609. Hence, to hold that the burden of proof is on the parties claiming the omission was intentional would be to hold, in effect, that, after the will has been admitted to probate as the solemn declaration of the testator's intentions as to the disposition of his property and those whom he had selected as proper objects of his bounty, it fails, *prima facie*, to express such intentions. It may be said that it is to be presumed that a testator would not intentionally fail to provide for a child or grandchild. If there is the slightest presumption of that kind, it is far weaker than the presumption that one, competent to make a will and to understand its contents, would forget or overlook one of his children or grandchildren. To fail to make provision for a child or grandchild in a will is a common occurrence; to forget or overlook them, under ordinary circumstances, is rare. In our opinion, the burden of proof was upon the interveners to show that their omission from the will was unintentional, and the result of accident or mistake. In reaching this conclusion, we have not overlooked *Stebbins v. Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159. The decision in that case is based on a statute worded like our own. The majority opinion merely holds that the evidence was sufficient to warrant the submission of the question whether the omission was intentional to the jury, and does not discuss the question of the burden of proof. In an able dissenting opinion, by Montgomery, J., concurred in by McGrath, C. J., that question is discussed at length, and the conclusion reached that the burden was on the party claiming that the omission was unintentional. On the facts stated, the majority opinion is not necessarily in conflict with the conclusion reached by the minority on that question. Hence, the dissenting opinion may be regarded as authority for the construction ²⁰⁸ we have placed on the section under consideration, and, so far as our research has extended, is the

only attempt at a judicial interpretation of the language of that section.

Some of the questions presented by the record require more specific attention, and we shall now proceed to consider them. It is contended that the court erred in permitting intervention after a decree for a partition of the lands had been entered. This contention is based on section 50a of the code, which provides that "any person who has or claims an interest in the matter in litigation, . . . may become a party to an action between any other persons, . . . either before or after issue has been joined in the action, and before the trial commences." But, however that section may affect the right of a party to intervene, we are satisfied that it was not intended, and should not be permitted, to require a court to pursue an erroneous theory to a worthless decree, nor to curtail in any degree its power to do complete justice, so long as it retains jurisdiction of the cause and the parties: See section 46 of the code. The present case will illustrate our meaning. It is a suit in equity in which the children of the testator claim title in fee to the lands to the exclusion of all other persons. Proceeding on the theory that they were the exclusive owners in fee, the court entered a decree and directed a sale. It was then brought to the attention of the court that the interveners claimed an undivided interest in the estate. That such claim was brought to the attention of the court by their petition of intervention is wholly immaterial, so long as the court was satisfied that there might be some basis for the claim. Will it be claimed that the court was bound to disregard such claim, because it was not brought to its attention before decree, and to proceed to a sale of a doubtful title? To those who had actual knowledge of the interveners' claims, such claims, undetermined, would be more than likely to prevent a sale; a sale to one not having such notice would amount to a judicial fraud. The court still retained jurisdiction of ²⁰⁹ the cause and the parties, and it seems to us it was not only its right, but its duty, to hear and determine the claims of the interveners, although not presented until after decree. It is true the sale was made under the decree as it stood when the petition in intervention was filed, but that appears to have been with the consent of the interveners who joined in the motion to confirm, and who asked only a share of the pro-

ceeds. Although our attention has been called to no case directly in point, we are all of the opinion that, under the peculiar facts disclosed by the record, it was not error to permit the interveners to come into the case after decree.

It is argued at some length that the court erred in overruling the demurrer to the petition of intervention. As such petition stood when the demurrer was overruled, it was based on the theory that the interveners, who it will be remembered are grandchildren of the testator, were included within the term "children" in the residuary clause of the will. That theory, to our minds, is untenable. It is a familiar rule of construction that, ordinarily, words should be taken in the sense in which they are commonly used. It is a matter of common knowledge that, in ordinary conversation and the affairs of life, the word "child" is commonly used to designate a son or daughter, a male or female descendant of the first degree. Such is Webster's definition of the term, and such is its primary signification according to all standard lexicons. It is safe to say that, standing alone, it is never understood to mean grandchildren. Bouvier says: "The term 'children' does not, ordinarily and properly speaking, include grandchildren or issue generally; yet sometimes that meaning is affixed to it in cases of necessity." In *Re Estate of Chapoton*, 104 Mich. 11, 53 Am. St. Rep. 454; 61 N. W. 892, the court, referring to the language of Bouvier said: "We shall find this statement of Bouvier confirmed in many cases involving wills, although cases are not rare where the term 'children' has been held coextensive with 'issue' or 'descendants.' Such holdings are not put upon the ²¹⁰ ₂₁₀ ground that the word 'children' has a technical or peculiar meaning in the law, but because such meaning is necessary to give effect to the instrument, or because of an evident intent upon the part of a testator. It is in deference to the rule that the intent is to be sought after and given effect in the construction of wills, which may be done to the extent of holding illegitimate children to be included in the term, 'children,' though the law ordinarily excludes them. See Bouvier's Dictionary, title 'Child,' subd. 3; In *re Curry's Estate*, 39 Cal. 529; 4 Kent's Commentaries, 345. In *Reeves v. Brymer*, 4 Ves. (Eng.) 692, cited by counsel, the court said that 'children' may mean 'grandchildren,' where there can be no other construction, but not otherwise: *Pride v. Fooks*, 3 De Gex & J. *252."

It is obvious from the portions of the will heretofore set out that no strained or unusual meaning of the word "children" is required to give effect to the instrument, or to carry out the intention of the testator. It is clear, therefore, that the interveners were not included in the residuary clause of the will, and that their original petition of intervention, based on the theory that they were thus included, failed to state a cause of action. But as the court found against that theory, and it was afterward abandoned by the amendment to the petition of intervention, the overruling of the demurrer was error without prejudice.

It is next contended that the court erred in permitting the amendment to the petition to the effect that the interveners had been omitted from the will by accident or mistake. The amendment was made after the case had been tried, and after the defendants had interposed proper and timely objections to the petition of intervention, and to the introduction of evidence which would tend to support the issue tendered by the amendment. It is clear, therefore, that the amendment was not warranted as an amendment to conform to the proof, because it is a familiar rule that an amendment of that character is permissible only ²¹¹ where the evidence tending to sustain the amendment has been received without objection. But, after the amendment was made, the case was opened, and the parties were permitted to introduce evidence, and were given a hearing on the issue tendered by the amendment. What has been heretofore said on the question of the right of the interveners to come into the case after decree is applicable here. If the evidence taken before the amendment was offered was of such a character as to satisfy the court that it would be unable to convey a clear title by a sale of the lands, without a further investigation of the claims of the interveners, it was eminently proper to permit the amendment, and give all of the parties an opportunity for further investigation and hearing. Such a course, it seems to us, was in the interest of all parties to the suit, and one of which none should be heard to complain, especially when the interest of minors is involved.

Another contention of the defendants is that the finding of the district court, that the omission of the interveners from the will was unintentional, is not sustained by sufficient evidence. The testator was seventy-six years old. The evidence, on the one hand, tends to show that his memory was

greatly impaired; on the other, that it was unusually retentive for a man of his years. There is little evidence bearing directly on what his intentions were with respect to the interveners at the time the will was made. On the part of the interveners, it was shown that, after the will was made, the testator repeatedly stated that he had made provision therein for all his grandchildren; that he had given them one hundred dollars each, except one who was an imbecile, to whom he stated he gave nothing because of his mental condition. That particular grandchild is not a party to this suit, and is not of the same parents as the interveners. On the part of the defendants, it was shown that, at the time the will was made, the attention of the testator was specifically called to the omission of the three grandchildren from the will, but notwithstanding that fact, he executed it without any alteration and showed by his words ²¹² and conduct that he was fully aware of the omission, and that it was intentional; that, after the will was made, he talked over the contents with a witness in the suit, and, in such conversation, the omission was pointed out to him, and he was asked why he had not provided for the other grandchildren, and he gave his reasons for the omission. The evidence further shows that there was some trouble between the testator and the interveners or some member of their family, the exact nature of which is not clearly disclosed. There is also evidence tending to show that the failure of the testator to recognize acquaintances on the street was due, rather to his defective eyesight, than to any impairment of memory.

By the pleadings on file in this suit, both the interveners and the defendants are committed to the theory that the will was duly admitted to probate. The decree of the county court admitting the will to probate is conclusive on all parties as to its due execution, and all questions affecting the competency of the testator to make a will: 2 Black on Judgments, 2d ed., sec. 635. Hence, it stands as one of the established facts in this case that the testator, at the time the will was made, was not lacking in testamentary capacity. In other words, it is conclusively established by the probate of the will that, at the time it was made, the testator possessed sufficient mind to understand, without prompting, the business about which he was engaged, the kind and extent of the property to be willed, the persons who were the natural objects of his bounty, and the manner in which he

desired the disposition to take effect, because that is all included in the findings on which the decree admitting the will to probate is based: Schouler on Wills, 3d ed., sec. 68. In view of the fact that the will had been admitted to probate, and the testamentary capacity of the testator thereby set at rest, we think the evidence is insufficient to sustain a finding that the omission of the interveners was unintentional. As stated in a former part of this opinion, the burden of proof was on the interveners. The testimony adduced by them ²¹³ is not wholly inconsistent with the theory that the omission was intentional. On the other hand, the testimony adduced by the defendants, at least a portion of it, is of such a character that it must either be rejected, or the omission held to have been intentional. None of the witnesses are discredited; on the contrary, it would seem that each gave the facts as he understood them. Hence, there is no ground for rejecting the testimony showing affirmatively that the testator knew of the omission, and that it was intentional. An examination of the entire evidence satisfies us that the finding of the district court is erroneous.

It is recommended that the decree of the district court be reversed and the cause remanded for further proceedings according to law.

Glanville, C., concurs.

Fawcett, C., not sitting.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

PRETERMITTED HEIRS.

- I. Object of Statute, 580.
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I. Object of Statute.

The object of a statute providing that a testator shall be deemed to have died intestate as to children not named or provided for in the will is to produce intestacy only when the child is unknown or forgotten and thus unintentionally omitted: *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109. The intent of such a statute is not to prevent children from being disinherited, but to require that the intention to disinherit them should clearly appear: *Boman v. Boman*, 47 Fed. 849. The object of the statute in regard to pretermitted heirs is not to compel the testator to make provision for any child, but solely to protect the children against forgetful omission or oversight, and the failure to allude to them in the will is evidence that they were omitted through forgetfulness of their existence, but when they are present to the mind of the testator, the statute affords no protection if provision is not made for them, and the fact that they are mentioned by the testator in his will is generally conclusive evidence that they were present to his mind, and takes them out of the provisions of such statutes: *Estate of Callaghan*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689. A statute providing for pretermitted children is not intended to produce equality, or to diminish the power of the testator, and any provision in the will which affords evidence that the child has not been forgotten is sufficient to prevent the application of the statute, and devising the child a vested remainder carrying with it a vested right to property answers its demands: *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

II. Rights and Remedies of Omitted Child.

a. *Are Unaffected by the Will.*—The right of a pretermitted child, born in the testator's lifetime, accrues on the testator's death: *Shelby's Exrs. v. Shelby*, 6 Dana, 60; *Schneider v. Koester*, 54 Mo. 500. The pretermitted child succeeds immediately by operation of law to the same portion of the testator's real property as if no will had been made, and as to such portion the testator is regarded as dying intestate, and the succession is directed by law and not by the will, and, as a necessary consequence, it would follow that every provision in the will, directly or indirectly, attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative against such child: *Smith v. Olmstead*, 88 Cal. 582, 22 Am. St. Rep. 336, 26 Pac. 521, 12 L. R. A. 46. A child and heir at law of a testator for whom his father has, by mistake, failed to provide by will, but who, being of full age, has appeared in proceedings resulting in a judgment establishing the will, cannot recover an intestate's portion of the land thereby devised: *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696. But this is clearly a mistaken conclusion, for if a child,

born after the execution of the will and during the lifetime of the testator is not named or referred to therein, he cannot contest the will, on the ground that he is omitted from it, as his rights are independent of it: *McIntire v. McIntire*, 64 N. H. 609, 15 Atl. 218. If a testator fails to mention or provide for one of his children in his will, the will is not invalid, and a suit to set it aside is not the proper remedy, but the testator dies intestate as to such child who may resort to the proper remedy to recover the share of the property saved to him by the statute: *Schneider v. Koester*, 54 Mo. 500; *Matter of Gall*, 5 Dem. Sur. 374; *George v. Robb*, 4 Ind. Ter. 61, 64 S. W. 615. One remedy of such child is to move the court to proceed with the administration of the estate, and as part of such administration to set over to such child his share of the estate as though the executor had died intestate: *In re Barker's Estate*, 5 Wash. 390, 31 Pac. 976. Or an action may be commenced by a child born after the making of a will, if not provided for or mentioned therein, to enforce its right to its portion of the estate against legatees, notwithstanding the estate has not yet been distributed: *Bunce v. Bunce*, 20 Civ. Proc. Rep. 332, 14 N. Y. Supp. 659. Such pretermitted heirs may also maintain ejectment for their inheritance: *McCracken v. McCracken*, 67 Mo. 590; *Smith v. Robertson*, 89 N. Y. 555. If there is a surviving wife and children of deceased who are devisees in the will, and the testator makes no provision therein for another child, such pretermitted child may maintain ejectment for his intestate share of the realty of which the testator died seised, if there is no pending administration: *Pearson v. Pearson*, 46 Cal. 609. Or a child omitted in the will of his father may bring ejectment to recover his portion of the real estate, or he may bring a suit by petition for partition: *Gage v. Gage*, 29 N. H. 533; and children not mentioned in an ancestor's will, and as to whom he died intestate, may come in as defendants, and set up their rights in partition proceedings commenced by devisees under the will: *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657. In such cases the will is not void, but those having possession of the estate will be required to contribute their proportionate part of the distributive share of the omitted child: *Branton v. Branton*, 23 Ark. 569; *Trotter v. Trotter*, 31 Ark. 145.

b. Takes Title by Descent.—In many states of the American Union, by express statutory provision, if a testator fails to name or make provision for his child, and in some cases the issue of such child, if the parent be dead, in his will without showing in some way that such omission was intentional, the pretermitted child takes the same share in the estate, and holds by the same title, as though the testator had died intestate. Under such statutes if the testator fails to make provision for a child in his will without showing that it was intentional, the pretermitted child takes the same share in

the estate, and holds by the same title, as though the testator had died intestate, and if the testator leaves a surviving wife and other children, who are devisees, the pretermitted child takes title by descent, and becomes a tenant in common with the devisees: *Pearson v. Pearson*, 46 Cal. 609; *In re Grider*, 81 Cal. 571, 22 Pac. 908. If any child, or issue of a child, is not named or referred to, and is not a legatee or devisee in the will of a person deceased, he is entitled to the same portion of the estate as if the deceased died intestate: *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; *Hargadine v. Pulte*, 27 Mo. 423; *Bradley v. Bradley*, 24 Mo. 311; *Gage v. Gage*, 29 N. H. 533.

III. Intention to Omit Child.

a. *When Inferable*.—A child or its issue omitted from the testator's will takes no share of his estate where it is made to appear that the omission of a devise in the will was intentional or was not occasioned by mistake: *Merrill v. Hayden*, 86 Me. 133, 29 Atl. 949; *Ramsdill v. Wentworth*, 101 Mass. 125. But there is no general rule for determining what is a sufficient indication of an intention to omit, and such intention, or want of intention, may be shown in various ways. Sometimes a very slight reference to the omitted child is deemed sufficient to show the intent to omit: *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Miller's Appeal*, 113 Pa. 459, 6 Atl. 715; while, on the other hand, it has been decided that although a will may refer to children expressly, such reference may not be sufficient to exclude such children from the benefit of the statute: *Lurie v. Radnitzer*, 166 Ill. 609, 57 Am. St. Rep. 157, 46 N. E. 1116; *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159.

The fact that a testator mentions in his will one closely related by blood or intimately associated in family relations with an omitted heir does not overcome the presumption that he was unintentionally omitted, nor show as matter of construction that he was in the mind of the testator and intentionally omitted: *In re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; and in order to prevent an heir not provided for in the will from taking his distributive share, it must be shown that the testator remembered him, and although he need not be directly named in the will, it must contain provisions or language that point directly to him, and it cannot be inferred, because the testator provided for the payment of debts due two of his children, that he intended to disinherit the remainder of them: *Pounds v. Dale*, 48 Mo. 270. If a testator has been twice married and leaves surviving him children by both wives, and a will by which he devises his entire estate to his second wife for life with remainder to her children begotten by him, with no other mention of his children, it cannot be presumed that the testator intentionally omitted his children by his first wife, and they are entitled to share in his estate after the termination of the life es-

tate: *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657. Or if a testator devises his estate to his wife for life and leaves small bequests to such children as were living at the date of his will, with no mention of his grandchildren, issue of a deceased son, and no disposition of the property after the termination of the life estate, no intent can be inferred from the will to disinherit any of those who are entitled to take after the termination of the life estate, and therefore the children of his deceased son are entitled to recover a share of his estate: *Hoffner v. Wynkoop*, 97 Pa. 130. If it is shown that a testator, who devised all of his estate to his wife and her heirs, understood that he had provided for his children by giving to his wife only a life estate in his property, this is sufficient to show that his omission to provide in his will for his children was not intentional, and was caused by accident and mistake, and they are therefore entitled to the same share of his estate as if he had died intestate: *Ramsdill v. Wentworth*, 101 Mass. 125. Contrary to the rule of the above cases it has been decided that if a testator devises his whole estate to his wife for life, with remainder to his children, naming them, this will show an intent to exclude from the provisions of his will the testator's grandchild, issue of a child who died before the execution of the will: *McMichael v. Pye*, 75 Ga. 189; and if a testator leaves seven grandchildren and in his will mentions two of them only and their parent, it must be presumed that the other five grandchildren were intentionally omitted, and not omitted through forgetfulness: *Merrill v. Sanborn*, 2 N. H. 499. If a testator devises his estate to his wife and provides in his will that her rights thereunder shall not be affected by the birth of any child born to him before or after his decease, he shows an intentional omission of his children from the provisions of his will, and a child born to him before his decease cannot maintain an action to recover a share of his estate: *Prentiss v. Prentiss*, 11 Allen, 47. If at the date of a testatrix's will she has one child living and is expecting the birth of another, which is born two weeks thereafter, provisions in the will that in case she died leaving no child, she bequeathed a certain legacy to her mother, and that if one or more children born to her should be living at her death, she bequeathed the income of such legacy only to her mother, the fund to go to her husband and heirs, sufficiently refers to her children to show an intent to omit them from the provisions of the will, and precludes them from sharing in the estate: *Smith v. Smith*, 72 N. H. 168, 54 Atl. 1014. If a testator remembers and mentions his daughter in his will, it cannot be presumed that he forgot to mention such daughter's child, whom he had adopted so as to entitle such child to an heir's share in his estate: *Fugate v. Allen*, 119 Mo. App. 183, 95 S. W. 980.

If the omission of a child from his father's will is intentional, although the testator would not have entertained such an intention but for a mistake as to the legal effect of matters outside the will,

the child is not entitled to a proportionate share of the estate: *Hurley v. O'Sullivan*, 137 Mass. 86.

b. *Necessity for Legacy*.—Where a testator in his will makes such an allusion to a child as to show that he had not forgotten to consider such child in the distribution of his estate, it will be sufficient to exclude such child from a distributive share in the estate of the testator, and it is not necessary that the child should have a legacy in the will: *Terry v. Foster*, 1 Mass. 146, 2 Am. Dec. 6; *Church v. Crocker*, 3 Mass. 17. Thus if a testator devises estate to his grandchildren, "children of my daughter S.," but gives no legacy to such daughter, she is not entitled to a portion of the testator's estate in the same manner as if he had died intestate: *Wild v. Brewer*, 2 Mass. 570. If a testator, among his descendants, leaves sundry children of a deceased daughter, and in his will he mentions her husband as his son in law, and gives a legacy to one of such children, it must be presumed that he had not forgotten the other grandchildren, and that they are therefore not entitled to a portion of his estate: *Wilder v. Goss*, 14 Mass. 357. If a child is expressly named in the will, though no legacy is left him, he is not entitled to the benefit of the statute, as the testator does not die intestate as to him: *Beck v. Metz*, 25 Mo. 70. If a testator expressly excludes his children from any legacy under his will, he thereby excludes the issue of a deceased child: *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513. When a will bequeathed ten dollars to the testator's daughter, it was decided to be not a case of an unintentional omission to provide for such child: *Case v. Young*, 3 Minn. 209; and it was also decided in *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109, that specific bequests, by name, to the minor children of the testator's adopted daughter, with whom they live, is a sufficient naming of, or providing for, the daughter to prevent the operation of a statute declaring that a testator shall be deemed to have died intestate, as to children not named or provided for in the will. On the contrary, it has been decided under an exactly similar statute that a clause in a will devising "to each of my heirs at law the sum of one dollar" will not take the will out of the operation of such statute: *Boman v. Boman*, 49 Fed. 329, 1 C. C. A. 274. And that a clause in a will by which the testator bequeaths to his son the family Bible, if he desires it, and if not, providing that it may be put into the hands of a granddaughter, naming her, and a clause directing the division of his books and clothing among his brothers and their families, but giving such granddaughter the privilege of selecting from them, if it is her wish, cannot be said, as matter of law, to make provision for her within the meaning of such statute, so as to conclude her from claiming that this testator unintentionally or by mistake or accident omitted to provide for her in his will: *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; but how a testator, while referring in his will to one of his heirs by name and making a provision under which some benefit may accrue to her, can be held

to have overlooked or forgotten, or not to have intentionally omitted her from everything except this benefit so provided, we cannot conceive.

IV. After-born Children.

Statutes which provide in effect that if a testator shall omit to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate that they would be entitled to if he died intestate, unless they have been provided for in his lifetime, or unless it appears that the omission was intentional, and not occasioned by accident or mistake, apply to children born in the testator's lifetime, but after the making of the will: *Bancroft v. Ives*, 69 Mass. (3 Gray) 36; *Minot*, Petitioner, 164 Mass. 38, 41 N. E. 63. And if a child is born to a testator during his lifetime, after making his will, making no provision for him, such child will share in the estate the same as if his father had died intestate, unless it appears from the will that the omission was intentional: *Ward v. Ward*, 120 Ill. 111, 11 N. E. 336; *Woodard v. Spiller*, 1 Dana, 180, 25 Am. Dec. 139; *Shelby's Exrs. v. Shelby*, 6 Dana, 60; *Shelby's Exrs. v. Shelby's Devisees*, 1 B. Mon. 266; *Carpenter v. Snow*, 117 Mich. 489, 72 Am. St. Rep. 576, 76 N. W. 78, 41 L. R. A. 820. The fact that the testator lived many years after omitted children were born without making any express provision for them has no effect to deprive them of the benefit of the statute: *Bressee v. Stiles*, 22 Wis. 120. Although a testator's intention to disinherit an after-born child need not be expressly stated in the will, yet it must in some way be indicated thereby, and the fact that the testator knew at the time of its execution that a child was likely to be born to him for whom he made no provision will not deprive such child of its rights under the provisions of the statute: *Lurie v. Radnitzer*, 166 Ill. 609, 57 Am. St. Rep. 157, 46 N. E. 1116.

But the facts that a testatrix, who by will dated nine months after her marriage devised all her estate to her husband, and had by an antenuptial agreement reserved to her sole use certain real estate, and the right to dispose of it by will, and that she had a child born about a month after the will was made, will justify a finding that her omission to provide for such child was intentional and not caused by accident or mistake: *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671. And there is no omission to provide for a child by will if the testator, after a bequest to his wife, whom he knew to be pregnant at the time of making the will, gave the whole of the rest of his property to a trustee to pay the whole income to the wife during life, and the reversion to those who at the time of her death would be his heirs at law: *Minot*, Petitioner, 164 Mass. 38, 41 N. E. 63. A devise by a testator to his wife of all of his property with the clause, "and her rights under this provision shall not be affected or changed by the birth of any child of mine, if any shall be born to me before or after my decease," manifests an

intention not to provide for a child born after the execution of the will: *Prentiss v. Prentiss*, 14 Minn. 18. A testator may totally disinherit his after-born children if such intent appears from his will, or he may limit his bounty to them to anything, no matter how insignificant it may be, and make its enjoyment depend upon any contingency, however remote. Thus if a testatrix, by her will, devises all of her estate to her husband, in case he should survive her, otherwise to any child or children she might leave, and she afterward dies leaving surviving her her husband and three children, born after the execution of the will, she shows a clear intent therein and thereby to disinherit her after-born children, in case of her husband surviving her: *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130, 4 N. E. 791. So a will disposing of the testator's entire estate to his wife absolutely, with power to sell and convey it as fully, amply, and completely as could the testator in his lifetime, shows an intention to disinherit a child born two months after making the will, where the testator had two other children living when the will was executed, for whom he made no provision: *Hawke v. Chicago etc. R. R. Co.*, 165 Ill. 561, 46 N. E. 240.

V. Posthumous Children.

In many states if a child is born after the death of the testator, and is not mentioned or provided for in the will, such child is, by statute, entitled to the same share it would have received if its father died intestate, and we apprehend that the same rule prevails everywhere in the absence of statutory provision. In such case no inference can be drawn from the fact that the posthumous child is not mentioned or provided for in the will that the testator intentionally omitted it: *In re Buchanan's Estate*, 8 Cal. 507; *Shelby's Exrs. v. Shelby*, 6 Dana, 60; *Shelby's Exrs. v. Shelby's Devises*, 1 B. Mon. 266; *Eyre v. Storer*, 37 N. H. 114; *Wilson v. Fritts*, 32 N. J. Eq. 59; *Sanford v. Sanford*, 5 Lans. 486, 61 Barb. 293; *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Willard's Estate*, 68 Pa. 327; *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111; *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288; *Armistead v. Dangerfield*, 3 Munf. 20, 5 Am. Dec. 501; *Chicago etc. R. R. Co. v. Wasserman*, 22 Fed. 872. Unless a posthumous child is provided for in the will of his parent, the conclusive presumption is that he was not excepted, and the law declares that he shall take the same share of his father's estate as if such father had died intestate: *Waterman v. Hawkins*, 63 Me. 156. And declarations of the testator before and after making his will are not admissible to show that an omission to provide therein for a posthumous child was intended as a disinheritance of such child: *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111. Although a testator makes provision in his will for his "surviving children," a child born to him after his death will take as though he died intestate when it does not expressly appear from the will that the

testator had in mind when making it the birth of such posthumous child: *Bowen v. Hoxie*, 137 Mass. 527. A posthumous child, unprovided for and pretermitted by the will of his parent, is entitled to a share of his estate, although such child is a daughter, and it appears from the will that the testator intended to give all of his estate to his sons: *Armistead v. Dangerfield*, 3 Munf. 20, 5 Am. Dec. 501.

Although it has been decided that a posthumous child cannot be disinherited like a child born before the testator's death, or the issue of a deceased child when it appears that the omission to refer to him in the will was intentional: *Waterman v. Hawkins*, 63 Me. 156; yet the better rule undoubtedly is that a posthumous child may be expressly excluded by the terms of the will, and if it appears therefrom that the testator intended to exclude all of his children as a class from the provisions of his will and to make his wife the sole object of his bounty, a posthumous child will be included in this expressed intention: *Leonard v. Enochs*, 92 Ky. 186, 17 S. W. 437.

The right of a posthumous child to take the share of the testator's estate as if he had died intestate accrues at the time of the birth of such child: *Shelby's Exrs. v. Shelby*, 6 Dana, 60; and the heirs mentioned in the will must severally contribute such portions of their real estate and personal property derived under the will as will make the share of such pretermitted posthumous child equal to what it would have been had his father, the testator, died intestate: *Shelby's Exrs. v. Shelby's Devisees*, 1 B. Mon. 266; *Wilson v. Fritts*, 32 N. J. Eq. 59.

VI. Adopted and Illegitimate Children.

The rights of pretermitted adopted children, that is, if they are legally adopted, are equivalent to the rights of those born in wedlock. Hence if a testator dies leaving a will in which no reference is made to his adopted child, it must be deemed that such omission was unintentional and such child is entitled to an heir's share in the testator's estate: *Fugate v. Allen*, 119 Mo. App. 183, 95 S. W. 980; *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530; *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089.

As to whether illegitimate children unintentionally omitted to be provided for in the will of their mother are entitled to share in the estate left by her upon her decease as if she had died intestate is a doubtful question, as it has been decided that such offspring is not a "child" within the meaning of the statute providing for pretermitted children: *Kent v. Barker*, 2 Gray, 535. While a directly opposite position was taken and holding made in *Estate of Wardell*, 57 Cal. 484.

VII. Parol or Extrinsic Evidence to Show Intent.

a. General Rule as to Admissibility of.—As to whether, under statutes in effect providing that if a testator omits to provide in his will for any of his children, the omitted child shall take the same share of the testator's estate as if he had died intestate, unless the child has been provided for by the testator in his lifetime, or the omission was intentional, parol evidence is admissible to show such omission to have been intentional or not, is a question upon which there is a great conflict of authority, and the cases are so equally divided that no established rule can be laid down. The trend of modern authority is, however, to maintain that such evidence is admissible. In Iowa, Massachusetts, Michigan, Rhode Island and Utah, this rule is firmly established. Thus in these jurisdictions, the question of whether such omission was intentional is one of fact which may be shown by parol evidence: *Woodvine v. Dean* (Mass.), 79 N. E. 882; and when an heir has been omitted from the will of his ancestor, the question whether or not the omission to provide for such heir was intentional or unintentional, or due to accident or mistake, is one of fact, which the pretermitted heir has a right to have submitted to a jury: *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159; *Carpenter v. Snow*, 117 Mich. 489, 72 Am. St. Rep. 576, 76 N. W. 78, 41 L. R. A. 820. Where this rule prevails, omission to provide for an heir in a will may be shown to be unintentional, either by the terms of the will or by extrinsic parol evidence, and the relation of the testator to the objects of his bounty and to the omitted heir, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for the consideration of the jury: *Ramsdill v. Wentworth*, 101 Mass. 125; *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345, 54 N. W. 159. But the evidence must be very clear that the omission was the result of accident or mistake, and the right of a child omitted from the will to share in the estate can rest on no other basis: *Moon v. Estate of Evans*, 69 Wis. 667, 35 N. W. 20.

Parol evidence is admissible also to show that the omission of a child of the testator from his will was intentional. Thus if the statute declares that, when a testator omits to provide in his will for any of his children, such child must have the same share of the estate of the testator as if he had died intestate, unless it appears that such omission was intentional, and he does fail to provide in his will for one of his children, the presumption under such statute is, that the omission was not intentional, but such presumption may be rebutted by extrinsic evidence, whether of declarations of the testator or collateral facts showing the intention of the testator to have been that which the language of the will expresses: In re *Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036. An inten-

tional omission of a child or the issue of a deceased child from the testator's will need not appear from the will itself, but may be shown by extraneous parol evidence: *In re O'Connor*, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; *Coulam v. Doull*, 4 Utah, 269, 9 Pac. 568; affirmed 133 U. S. 216, 10 Sup. Ct. Rep. 253, 33 L. ed. 596.

Extrinsic evidence, either written or parol, as well as the declarations of the testator at the time of executing the will, or made before or after, are admissible, under the rule under consideration, to show that children not mentioned in the will have already been provided for, and that such omission was intentional, and not the result of accident or mistake: *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Converse v. Wales*, 86 Mass. (4 Allen) 512. Parol evidence, that the testator intentionally omitted a grandchild from his will is admissible, it has been maintained, to exclude the claim of such grandchild to a share of the estate: *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736. And oral evidence that a testatrix, who devised all of her estate to her husband, was a woman of great intelligence and capacity, that she was very fond of her children, who were of tender age and never separated from her, that she had great affection for and perfect confidence in her husband, and that he was very devoted to her, is admissible, and will justify a finding that her omission to provide in her will for her children was intentional, and not caused by accident or mistake, although no declaration of the intention of the testatrix appears: *Buckley v. Gerard*, 123 Mass. 8.

On the other hand, it is maintained with equal vigor in California, Illinois, Missouri and Washington, that, under such statutes as we are considering, parol evidence is not admissible to show an intentional or unintentional omission by a testator of his child from his will, and that such intent must appear from the face of the will itself. The rule in California is that parol evidence is inadmissible for the purpose of determining whether the omission from a will of a child entitled, in the event of intestacy, to take a share of the estate, was intentional on the part of the testator. This can be determined only from the face of the will: *Estate of Garraud*, 35 Cal. 336; *In re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; *Estate of Callaghan*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689. And a declaration of intent on the part of a testator to disinherit a child whose name is omitted from his will is not admissible. Such intent must appear from the face of the will: *Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. 379; *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089. In Illinois the doctrine prevails that the declarations of a testator made at the time of erasing a clause in his will which made provision for his child are not admissible to prove his intention to disinherit such child: *Lurie v. Radnitzer*, 166 Ill. 609, 57 Am. St. Rep. 157, 46 N. E.

1116. In Missouri, the intent of a testator to omit his heir from his will must in some way appear from the face of the will itself, and parol evidence of any nature including the declarations of the testator at the time of making the will, that he intended to omit his children therefrom, are not admissible: *Bradley v. Bradley*, 24 Mo. 311; *McCourtney v. Mathes*, 47 Mo. 533; *Pounds v. Dale*, 48 Mo. 270. And if the children of the testator are neither expressly named in the will, nor so alluded to as to show affirmatively that they were in his mind when making it, the presumption is conclusive that they were forgotten: *Wetherall v. Harris*, 51 Mo. 65.

In the state of Washington the rule prevails that extrinsic evidence is not admissible to show that the provision of a will devising all of the testator's property to his wife, "and to her heirs forever," was intended by the testator as such a provision for his children as will take the will out of the operation of a statute providing that a testator shall be deemed to die intestate as to such child or children, or in case of their death, descendants of such child or children not named or provided for in his will: *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598. Or if a wife dies leaving a will giving her entire estate to her surviving husband, and making no mention of their children, oral testimony is not admissible to show that she intended to omit them: *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779. Nor is extrinsic evidence admissible to show that the testator had made provision for omitted children, otherwise than by his will: *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360.

b. Presumption and Burden of Proof.—If a testator fails to provide in his will for one or more of his children, the presumption of law is that such omission was not intentional: *Tucker v. City of Boston*, 35 Mass. (18 Pick.) 162; *Wetherall v. Harris*, 51 Mo. 65; *Merrill v. Sanborn*, 2 N. H. 499; *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Marsh v. Loring*, 6 Wall. 337, 18 L. ed. 802, affirming 2 Cliff. 469. Such presumption is, however, always rebuttable, and in some jurisdictions this may be done by parol evidence: *In re Allwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036; while in others it can be rebutted only by its being made to appear from the face of the will that the child or children were remembered by the testator at the time of the execution of the will: *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657.

It has been decided, contrary to the rule laid down in the principal case, that when a child omitted from his father's will claims his share of the estate, the burden of proof is on those who oppose the claim to show that the omission was intentional: *Ramsdill v. Wentworth*, 106 Mass. 320.

FORD v. STATE.

[71 Neb. 246, 98 N. W. 807.]

MANSLAUGHTER—Accidental Killing.—Pointing a Loaded Revolver at a person who does not know whether it is loaded or not is an assault, and if the person pointing the weapon pulls the trigger and discharges it, thus killing the person assaulted, the former is guilty of manslaughter, although he had no desire or intent to injure the person killed, and the shot was accidental. (pp. 592, 593.)

MANSLAUGHTER—Request for Instructions.—An accused on trial for murder is entitled to have his theory of the defense submitted to the jury, but if under his own theory he is guilty of manslaughter, and is convicted of that crime only, his rights are not prejudiced by a failure to present his theory of the defense by specific instructions. (p. 594.)

MANSLAUGHTER — Accidental Killing — Excessive Sentence.—If a person points a pistol at another in sport, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, the person holding the pistol is guilty of manslaughter, although the killing is purely accidental, but under such circumstances a sentence of seven years in state's prison is excessive and should be reduced to four years. (p. 596.)

A. G. Fisher and J. M. Tucker, for the plaintiff in error.

F. A. Pront, attorney general, and N. Brown, for the defendant in error.

247 BARNES, J. The state prosecuted Soney Ford in the district court for Cherry county for killing one Allen Rothchilds. The information charged him with murder in the first degree, and the jury found him guilty of manslaughter. The trial judge sentenced him to imprisonment in the penitentiary for the period of seven years. To reverse this sentence he brings error, and will be called the plaintiff.

1. It is contended that the evidence does not sustain the verdict, and the special reason given for this contention is that it was not shown that the killing was done while the plaintiff was in the commission of an unlawful act. The facts, as shown by the record, are substantially as follows: The plaintiff is a colored man, who had been a soldier in the regular army and was discharged while his command was at Fort Niobrara, near the village of Valentine, in Cherry county, Nebraska. After his discharge he was employed in driving a team, with which he carried passengers to and fro

between the village of Valentine and the Fort. On the evening of December 24, 1902, at about 9 o'clock, the plaintiff started from Valentine to the Fort with four or five passengers, and on the way they concluded to stop at what is commonly known as the "Hog Ranch," a vile resort for men and women, situated near the Post. When they arrived at this resort, they tied the team and went into that part of the ranch called the dance-hall. They found several persons there, both men and women, all colored; and after warming themselves at the stove the plaintiff danced a couple of times; after the dance was over he went up to the platform that the piano stood on, and where Rothchilds sat, having the pistol with ²⁴⁸ which the shooting was done in his hand. He flourished it around, and the deceased said to him, "You should mind how you handle a gun around here; you have got your finger on the trigger"; and the plaintiff said, "I know I have, but I want to show you how it works." The pistol was pointed directly at Rothchilds' face, and was, at that instant, discharged; deceased fell from the piano stool where he was sitting, and the plaintiff ran up and tried to help him up; threw the revolver on the floor, and said to the bystanders, "Don't hurt me, I didn't mean to shoot him."

There was no evidence showing, or tending to show, any ill-feeling between Rothchilds and the plaintiff, and no motive was shown for the killing. Of course there is some dispute in the testimony over minor particulars, but the foregoing fairly states the situation, and what occurred at the time the fatal shot was fired. It is evident from the record and the verdict that the jury acquitted the plaintiff of murder in the first degree and murder in the second degree, finding that there was no premeditation or deliberation, and that the shooting was done without malice; but did find that the killing was done unintentionally while the plaintiff was in the commission of an unlawful act. We think that the evidence fully sustains this verdict. The pointing of the revolver at the deceased and the pulling of the trigger, under the circumstances, was an unlawful act.

The pointing of a loaded revolver at another, if within range, is an assault, and the same is true if it is not loaded, if the person aimed at is not aware of the fact: Maxwell's Criminal Procedure, 2d ed., 81; Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373. As already indicated, to point a gun

or pistol at a person who does not know but that it is loaded, and has no reason to believe that it is not, is an assault: 1 McClain's Criminal Law, sec. 233; State v. Shepard, 10 Iowa, 126; State v. Triplett, 52 Kan. 678, 35 Pac. 815. In the case of State v. Shepard, the defendant was indicted for an assault with a gun with intent to commit murder, but was ²⁴⁹ convicted of an assault only. At the close of the testimony the defendant requested the court to instruct the jury: "First, that they must find that the gun with which the alleged assault was committed, was loaded and in a condition to be fired off, or the presentation of it was no assault; second, that if they found the gun was not loaded, they would find the defendant not guilty; third, that if they did not find an intent to kill, they should find the defendant not guilty." The refusal to give these instructions was assigned as error. The court said: "We do not think the court erred. Mr. Greenleaf (volume 1, section 59) states that the presenting a gun or pistol at a person is an assault. But he adds, that 'whether it be an assault to present a gun or pistol, not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.' After viewing the question in its various lights, we are inclined to hold with those who regard it as an assault, where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not." In State v. Triplett, 52 Kan. 678, 35 Pac. 815, it was held: "A person may be guilty of an assault upon another with a pistol without firing it at all, and if he does fire it, without intending at the moment of firing to hit the person upon whom he is charged with committing the offense, when the attitude or action of a party is threatening toward another, and the effect is to terrify, the offense of assault is complete. . . . The state interferes with and punishes evil conduct whenever, among other reasons, it tends to public disturbance or breaches of the peace, creates disquiet in the community, or inflicts on the individual a wrong entitling him to governmental protection."

The testimony discloses that when the plaintiff pointed the revolver at Rothchilds he put him in fear. The remark made by the deceased shows that he feared injury, therefore the assault, even without the firing of the pistol, was complete. And so it may be said with absolute certainty ²⁵⁰ that at the time the fatal shot was fired, although it was

done unintentionally, the plaintiff was in the commission of an unlawful act.

2. It is further contended that the court erred in refusing to give the jury the following instruction requested by the plaintiff.

"You are instructed by the court that, if you are not convinced beyond a reasonable doubt by the evidence that the defendant discharged the pistol intentionally, and knew or had reason to believe it was then loaded, but, on the contrary, the evidence undisputed tends to the belief that it was accidental, and not done with any intent or desire to injure Rothchilds, you should acquit the defendant."

This instruction is so faulty that the court was justified in refusing to give it. As we have seen, the evidence was amply sufficient to convict the plaintiff of the crime of manslaughter, and the mere fact that the shooting was accidental, and not done with intent or desire to injure the deceased, did not entitle the plaintiff to an acquittal. At the time the fatal shot was fired, although the plaintiff had no intention or desire to injure the deceased, and although the shot was accidental, yet he was in the commission of an unlawful act, and the result of the shooting, together with this fact, clearly rendered him guilty of the crime of manslaughter. We hold, therefore, that the court did not err in refusing to give this instruction.

3. It is also contended that the plaintiff was entitled to have his theory of the case submitted to the jury. It is a sufficient answer to this contention to say that, by the plaintiff's own theory, coupled with the undisputed facts, he was guilty of the crime of manslaughter, and, the jury having found him not guilty of a greater offense, the failure of the court to give any other or more specific instruction relating to his theory in no manner prejudiced his rights.

4. Lastly, it is contended that the court erred in refusing to consider plaintiff's supplemental motion for a new trial, filed on the ninth day of February, 1904. The particular ²⁵¹ grounds of this motion are alleged to be newly discovered evidence material for the defendant, which could not, with reasonable diligence, have been discovered and produced at the trial, or within three days after the verdict was rendered; and such alleged newly discovered evidence is presented with the motion in the form of an affidavit. This affidavit is

made by one Arthur N. Compton, one of the surgeons who attended the deceased from the day he was shot to the time of his death. The substance of the affidavit is that the doctor, during a professional visit to the deceased, asked him how the shooting occurred, and what caused it, and that the deceased answered as follows: "Ford did not intend to shoot me, it was an accident," or words to that effect. Even if this evidence were true, and should be so accepted by the jury, still the plaintiff, under the circumstances, would be guilty of the crime of manslaughter. Again, the evidence was merely cumulative, and its effect would only strengthen the other evidence given on the trial, and which tended to show that the shooting was accidental. Indeed, the jury must have found that the shooting was unintentional, otherwise it would have found the defendant guilty of either murder in the first or second degree. Again, the affidavit and motion have not been preserved and brought here in the form of a bill of exceptions, and therefore we must refuse to consider it. For these reasons, we cannot say that the trial court erred in refusing to consider the supplemental motion and grant a new trial thereon.

A careful examination of the evidence convinces us that the jury arrived at a correct verdict. It is apparent that the plaintiff was not actuated by any motive of hatred or revenge in his actions toward the deceased. It rather appears that he was having a good time just before the shooting occurred; that he had danced a couple of times with the women; that he had given an exhibition of what is called the "Buck and Wing" dance, and in fact was cutting quite a wide swath, to use a common expression; that while showing off, so to speak, he drew the pistol, which he had ²⁵² some reason to suppose was not loaded, and with his finger on the trigger pointed it at Rothchilds; deceased was frightened, and told him to look out how he handled the pistol around there, that he had his finger on the trigger, and the plaintiff replied that he knew it, and he wanted to show him how it worked; that he pulled the trigger with the pistol pointed directly at the face of his victim, and the shot which followed was as much a surprise to the plaintiff as to anyone. In this view of the case he was technically guilty of the crime of manslaughter, and while he ought to receive a reasonable amount of punishment for his criminal carelessness, and his uncalled for and unlawful act, yet it is our opinion that the

sentence imposed by the trial court is too severe. The fact that plaintiff has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor treat him as having no rights. Our constitution provides: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." We think that a sentence of seven years in the penitentiary, under all the circumstances, may fairly be said to be a cruel punishment, and under the power given us by section 509a of the Code of Criminal Procedure we will reduce the sentence three years. The judgment of the trial court is reduced to imprisonment for four years, and, as thus modified, is affirmed.

Judgment accordingly.

Holcomb, C. J., concurs.

Sedgwick, J., absent and not sitting.

Where One Points a Gun or Pistol at another in a reckless or negligent manner or in sport or play, without any intention to take life or do bodily harm, and it is accidentally or unintentionally discharged, killing him, the offense is manslaughter: See the note to Johnson v. State, 90 Am. St. Rep. 581.

DICKSON v. STEWART.

[71 Neb. 424, 98 N. W. 1085.]

CONTRACTS.—Want of Mutuality is No Defense, even in an action for specific performance of a contract, when the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. (p. 600.)

STATUTE OF FRAUDS—Trusts.—One who, under an agreement, purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption and at an inadequate price, cannot set up the statute of frauds against the person for whom he purchased, as the law will hold him to be a trustee *ex maleficio*. (p. 601.)

FRAUD—Statute of Frauds.—A court of equity will never permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud. (p. 602.)

MORTGAGES — Foreclosure — Redemption—Limitation.—The right to foreclose a mortgage, and the right to redeem therefrom, are reciprocal, and an action may be brought to redeem at any time before the statutory bar is complete. (p. 603.)

DEED AS MORTGAGE—Evidence to Show.—If a person acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with the judgment debtor to hold the title thus obtained as a security for a loan of money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, is designed simply as security for a loan, and parol evidence is admissible to show the nature of the transaction. (p. 603.)

INTEREST—Application of.—Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterward, if there be a surplus, it is applied to sink the principal, and so toties quoties, taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. (pp. 604, 605.)

J. L. Epperson & Sons, for the plaintiffs in error.

G. H. Hastings and L. B. Stiner, for the defendant in error.

⁴²⁵ **FAWCETT, C.** On the twenty-ninth day of March, 1893, defendant in error, hereinafter styled plaintiff, was the owner and in possession of a farm of one hundred and sixty acres of land in Clay county. A mortgage which he had given some years prior thereto had been foreclosed, and, on the day named, the farm was about to be sold by the sheriff under the decree of foreclosure in that case. Plaintiff alleges that, just before the opening of the sale, he called upon plaintiff in error, hereinafter styled defendant, and entered into an agreement with defendant, whereby it was agreed and understood between them that defendant should bid in the land for plaintiff, pay for the same and take the title thereto in his own ⁴²⁶ name as security for the money so paid, and convey the same to plaintiff at any time that plaintiff should demand such conveyance, upon payment to him by plaintiff of any balance that might then be due and unpaid. That defendant, in accordance with this agreement, bid in the land for nineteen hundred and sixty dollars. That it was further agreed that defendant should place a mortgage on the land for sixteen hundred dollars, and a second mortgage for one hundred and twenty dollars. That, as additional security for his advances, defendant was to have the rents, issues and profits of the premises until he should be fully reimbursed; that when so reimbursed defendant and his wife were to make the plaintiff a good and sufficient deed to said premises, free and clear of all encumbrances excepting the two mortgages above de-

scribed. That it was further agreed that the rents and profits arising from the premises should be applied: First, to the payment of taxes; second, to the payment of interest on said two mortgages; and, third, to the payment of the moneys advanced by defendant. That defendant has taken all of the rents and used the same, and refuses to render any account thereof, and refuses to convey said land to plaintiff, notwithstanding the fact that plaintiff stands ready and willing to make an accounting with defendant, and to pay any sum that may be due defendant. That plaintiff has many times during the past two years demanded a deed and accounting, which have been wholly refused. Wherefore, he prays that an accounting may be had; that defendant may be decreed to hold the title to said premises as trustee for plaintiff; that defendants be decreed to convey said premises to plaintiff in accordance with the terms of the agreement; that on failure to so convey, the decree stand as such conveyance; and for such other, further and additional relief as in equity and good conscience plaintiff ought to have. For answer defendants demur generally to the fourth paragraph of plaintiff's petition; deny all of the other allegations therein, and then allege that the defendants, nor either of them, nor any person authorized by them, or either of them, ever made or signed any memorandum ⁴²⁷ or note thereof, or any contract in writing for the sale of said land, or in any manner relating thereto, or for the transfer, granting, assignment or surrender of any interest therein to the plaintiff or to any other person; that neither of the defendants nor any person authorized by them, or either of them, ever made or signed any note or memorandum in writing agreeing to make a conveyance or transfer of said land, or any interest therein to the plaintiff or any other person, and said alleged agreement was not, by its terms, to be performed within one year from the making thereof. Wherefore, they pray that plaintiff's petition be dismissed. Plaintiff's reply was a general denial.

The court below found generally for plaintiff, that the title to the land in question was taken by defendant as security for money advanced by him, with the express understanding that the same was to be reconveyed to plaintiff on the payment of the amount due, and that there is still due defendant from plaintiff three hundred and ninety-nine dollars and seventeen cents, which is a lien on the premises in

controversy; and, after stating the amount by items, the court adjudged that defendant have a lien upon the premises in controversy for the said sum of three hundred and ninety-nine dollars and seventeen cents; that plaintiff pay said sum into court for the use of defendant, and that the defendants make to the plaintiff a good and sufficient deed to the premises within thirty days from the date of the decree, and, in the event of their failure so to do, that the decree should in all things operate, and be taken and construed as such deed of conveyance, and that plaintiff pay the costs of the action.

Counsel on both sides devote a great deal of space in their briefs to the discussion of express, constructive and resulting trusts—a very interesting field of discussion, and one in which the writer would gladly accompany them if time would permit; but, as the only question to be determined in this case is the correctness of the holding of the district court that the deed in question was a mortgage, we feel constrained to confine this opinion to a discussion of that question alone.

⁴²⁸ There is no conflict in the evidence as to the making of the contract. Plaintiff testifies that on the day the sheriff was going to sell the property, and just prior to the opening of the sale, he called upon the defendant and said: "Now, Frank, I did a favor for you once and I want you to help me now. I want you to buy this place for me, and when I get the money I will redeem it. So Dickson bought the property. . . . Dickson was to buy the place for me, and when I got the money I was to give it to him; then he was to deed it back to me." The defendant himself testifies: "Well, at the time that this land was for sale, Mr. Stewart came to my office, and he told me that he wanted to buy this land at the sheriff's sale, but that he didn't have any money, or not enough money, to buy it; and that the sheriff said he would not take him, and that he advised him to come and get me to buy the land for him, and then Stewart said to me that he wanted me to go up and buy the land for him, as Davis, the sheriff, would take me, and that he, Stewart, wanted some one to buy the land that he could depend on." The court asked defendant the following questions:

"Q. Now, was it your understanding, at the time that you bought this farm, that you were to buy it and hold it until Mr. Stewart could redeem it and pay you back the amount that you had paid out? Was that your understanding and

intention? A. Yes, sir, I was to buy it, to buy land for him.

"Q. And hold it until he paid you back? A. Yes, sir.

"(By General Hastings.)

"Q. You were to hold the land until it was redeemed, for your security? A. Well, I think so, but I didn't think that it would run ten years."

In the light of this testimony we do not see how the trial court could have done otherwise than to find that the deed from the sheriff to the defendant, although absolute in its terms, was in fact a mortgage from the plaintiff ⁴²⁰ to the defendant as security for the money advanced by defendant.

Defendant contends that the rule so frequently announced by this and other courts that a deed, though absolute upon its face, if intended as security, will be held to be a mortgage, does not apply in a case where the maker of the deed is a third party. In other words, that to have entitled plaintiff to rely upon this rule, he must himself have been the grantor in the deed, when, as a matter of fact, the grantor was the sheriff. We do not think the contention is sound. While the sheriff is the nominal grantor in the deed, yet, the interest which he conveyed thereby was the interest of the plaintiff. The plaintiff at that time was the owner of the fee and in possession of the premises, and the deed by the sheriff conveyed that ownership and right of possession to the defendant, so that, in effect, it was a deed from the plaintiff to defendant. It is further contended by defendant that the contract was void because the relation of creditor and debtor was not created by the contract; that, if plaintiff failed to repay the money to defendant, defendant would have had no action against him for the recovery of the money. In other words, that the contract was void for want of mutuality. We are unable to agree with this contention, for two reasons: First, the relation of debtor and creditor was created. Under the same evidence which we have quoted from the record, defendant could at any time, after a reasonable time had elapsed, have demanded payment from the plaintiff, and, in the event of plaintiff's failure to pay, could have proceeded to foreclose his deed as a mortgage, with all the rights of any ordinary mortgagee. Second, this court has held in *Bigler v. Baker*, 40 Neb. 325, 58 N. W.

1026, 24 L. R. A. 255, that "want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within its terms." In this case plaintiff had complied with his part of the contract. After entering into this agreement with defendant, he made no effort ⁴³⁰ to obtain the money elsewhere to redeem the property from defendant's bid, but allowed the sale to defendant for nineteen hundred and sixty dollars, of property which the undisputed evidence shows to have been worth from three thousand two hundred dollars to three thousand five hundred dollars, to be confirmed, and a deed to be issued to defendant thereunder, and immediately delivered possession of the premises to defendant, relying upon the fact, as stated by defendant in his testimony, that defendant was a man "that he could depend on." Plaintiff had "performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement." Hence, under the decision of this court in *Bigler v. Baker*, 40 Neb. 328, 58 N. W. 1026, 24 L. R. A. 255, if a want of mutuality had existed in this case, it would not be a valid objection to plaintiff's right to recover. While we concede that there is some conflict in the authorities upon this point, that conflict was considered by this court in *Bigler v. Baker*, and the rule above announced adopted as the true rule.

The next contention of defendant is that section 3, chapter 32 of the Compiled Statutes (Annotated Statutes, 5952), is a complete barrier to plaintiff's right to recover. Defendant must also fail in this contention. If defendant did in fact bid in the land for plaintiff under the agreement set out, he held in trust for him, and had no other interest in it than that of a mortgagee to secure the repayment of the purchase money and other advances made by him. But if he had no intention of keeping his part of the agreement, and did not in fact intend to hold the property in trust for plaintiff, he was guilty of a fraud which the court will relieve against. The court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act into a trustee for those who have been injured thereby: *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696. Defendant relies upon section 3, chapter 32, Compiled

Statutes, but he overlooks section 6 of the same chapter (Annotated Statutes, 5955), which reads as follows: "Nothing in this chapter contained shall be construed ⁴³¹ to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." And he also overlooks another very important proposition: That a court of equity will never permit a party to shield himself behind a statute of frauds in order to perpetrate a fraud. In the case of *Sanford v. Norris*, 4 Abb. App. (N. Y.) 144, the court say: "The circumstances attending his purchase are not obscured in the least by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violated faith; and the simple question presented to this court is, whether the fruits of his perfidy are secured to him by a law having for its object the prevention of frauds. It stands indisputably proved that the defendant obtained this title on the pretense that he was purchasing for Mrs. Sandford, as a friendly act to her, and under agreement with her that he would take and hold the title for her benefit. Having thus obtained the title himself, he claims and insists that he is under no legal obligation to carry out the arrangement, because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him with impunity. But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been considered open for discussion, it must now be deemed settled by the recent decision of this court in *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, wherein the equitable principle is recognized as the established law of this state, that 'equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds.' "

The case of *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, considers this proposition at great length and quotes from a large number of cases, both in this country and England, all to the effect that a court of equity will never permit the statute of frauds to be used as a shield for the perpetration of a fraud.

Another contention of defendant is that, if plaintiff had a right of redemption, it should have been exercised within ⁴³² a reasonable time; that so long a time has elapsed since the making of the agreement that plaintiff ought not now to be permitted to exercise the right of redemption. That

matter has also been settled adversely to defendant by this court in *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369, in which it is held that the right to foreclose and the right to redeem are reciprocal, and that an action to redeem may be brought at any time before the statutory bar of ten years is complete: Citing *Seawright v. Parmer* (Ala.), 7 South. 201; *Green v. Capps*, 142 Ill. 286, 31 N. E. 597; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765, and cases there cited. It follows, therefore, that plaintiff was not precluded from maintaining this action by lapse of time.

Defendant relies with great confidence on *Walter v. Klock*, 55 Ill. 362, but even if the supreme court of Illinois had not subsequently passed upon the same matters involved in that case, it would easily be distinguishable from the case at bar. As a matter of fact, the supreme court of Illinois, in *Reigard v. McNeil*, 38 Ill. 400, has held: "It has been held repeatedly that deeds, in form absolute, may be shown to be mortgages in fact. Courts are not estopped from looking into the facts and circumstances of such a deed, to ascertain whether it was not intended as a mere security for the loan of money. And parol evidence is admissible to show the transaction to be of that character. And where a party acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for a loan of the money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, was designed simply as security for a loan."

And in *Walter v. Klock*, 55 Ill. 362, that court say that the case they were then considering had no application to the facts in the case of *Reigard v. McNeil*, 38 Ill. 400. And, later, in *Klock v. Walter*, 70 Ill. 416, the court say: ⁴³³ "At the September term, 1870, this case was before this court, and is reported in 55 Ill. 362. . . . The evidence establishes beyond doubt that the whole transaction was for the benefit of complainant, and that she was to refund the money, with interest. It operated as a loan to her, and, under the terms of the arrangement, the purchase at the sale, by McCullom, operated as a mortgage. He was simply to hold the land until complainant could sell it, and pay the money,

with interest. By the arrangement he took the legal title, but in equity a trust resulted to her": Citing *Reigard v. McNeil*, 38 Ill. 400, and *Smith v. Doyle*, 46 Ill. 451, each being a case where a sheriff's deed was held on parol proof to be a mortgage. It will thus appear that the supreme court of Illinois, instead of favoring defendant's contention, is clearly in line with our holding in this case.

Defendant assigns five errors in the court's computation, all of which we have carefully considered. The court charged defendant with thirty dollars for rent of pasture for the year 1894. This was error, as no rent was paid for the pasture that year. Defendant is charged with one hundred and forty-six dollars and seventy-one cents and interest, for sand in 1897. This is not quite correct. The total amount is one hundred and forty-six dollars and thirty cents, and interest should only be charged on one hundred and forty dollars and twenty cents from December 12, 1902. The court charged defendant with four hundred bushels of corn in 1893, eighty dollars. The amount was only three hundred bushels, sixty dollars, an error of twenty dollars. The court charged defendant with corn rental in 1896, thirty dollars. The evidence shows, and the parties agree, that there was a total failure of the crop for 1896, so that no rent was received for that year. We observe also that the court charged defendant with only ninety dollars for six hundred bushels of corn in 1895, instead of one hundred and twenty dollars, an error of thirty dollars the other way. The decree should be amended so as to correct these errors. Defendant also claims that the court erred in charging defendant with five hundred bushels of corn for 1902, claiming that five hundred bushels was the total crop and not the rent portion thereof; but by reference to question 12, record, page 97, it will be found that the five hundred bushels of corn referred to was ⁴³⁴ the rent portion of the crop; hence the finding of the court on that point is correct.

The court followed an erroneous rule in computing interest on the debits and credits. The rule is well established that "interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterward, if there be a surplus, such surplus is applied to sink the principal, and so toties quoties—taking care that the principal thus reduced shall not at any time be suffered to accumulate by

the accruing interest": *Mills v. Saunders*, 4 Neb. 190; *Davis v. Neligh*, 7 Neb. 78. This method the court did not adopt.

The decree fails to do complete justice to the defendant in another particular, namely: Before plaintiff would be entitled to a deed from defendant for the lands in controversy, he should not only pay the amount found due under the accounting of the court, as corrected by this opinion, but he should also relieve defendant from his liability on the sixteen hundred dollar note and mortgage.

The case should be reversed and remanded to the district court, with directions to make another computation in harmony herewith, and to modify the decree so as to require plaintiff to pay the corrected amount and relieve defendant of his liability on the sixteen hundred dollar note and mortgage, within a reasonable time to be fixed by the court; and that, upon such being done, defendant be required to reconvey; and we so recommend.

Albert and Glanville, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to that court to correct its computation and modify its decree to conform to the views expressed in said opinion.

Judgment accordingly.

One Who Verbally Agrees with the owner of land, prior to a judicial sale thereof, to purchase the property and hold it for his benefit, to be redeemed on equitable terms, will oftentimes be decreed to hold the property in trust for the execution defendant, and the plea of the statute of frauds will be unavailing: See the note to *McCoy v. McCoy*, 102 Am. St. Rep. 236.

MOORES v. STATE.

[71 Neb. 522, 99 N. W. 249.]

MANDAMUS—Discretion of Court.—An application for a writ of mandamus is addressed to the sound judicial discretion of the court, and the circumstances of each case must be considered in determining whether the writ shall issue. After it has issued, however, it is only in a clear case of abuse of discretion that the granting of the writ will be reversed on appeal. (p. 610.)

MANDAMUS Against Officers to Suppress Gambling.—If prosecutions have failed to close a gambling-house run in open violation of law, the existence of the remedy by complaint and arrest of the

offenders does not prevent the issue of a writ of mandamus to compel the mayor and chief of police to perform their duty, and exercise their summary powers to prevent such violation of the laws. (p. 610.)

MANDAMUS—Motives of Relator.—The fact that one of the relators, suing out a writ of mandamus to compel the closing of a gambling-house openly run in violation of law, admits that his motive in seeking to close such house is the belief that a certain person who is actively assisting in its operation is interested in its profits, is not ground for reversing the judgment granting the issuance of the writ. (p. 612.)

MANDAMUS to Close Poolroom.—The keeping of a poolroom in open violation of law is such act as may be prevented by a writ of mandamus directed against municipal officers whose duty it is to close such room. (p. 613.)

W. J. Connell, for the plaintiffs in error.

L. I. Abbott and I. J. Dunn, for the defendant in error.

523 HASTINGS, C. This is an error case brought to reverse the granting of a peremptory writ of mandamus by the Douglas county district court. The action was brought by I. J. Dunn and L. I. Abbott not only against Frank E. Moores, mayor, and John J. Donahue, chief of police in the city of Omaha, who are plaintiffs in error, but also against the members of the board of fire and police commissioners and P. J. Mostyn, acting chief of police. A demurrer on behalf of the board to the petition was sustained. The acting chief of police, Mostyn, had ceased to exercise such functions before the hearing and was dismissed. A peremptory writ was awarded against the chief of police, commanding him to forthwith arrest, or cause to be arrested, all persons found violating the laws of the state or the ordinances of the city relating to gambling, or operating or maintaining **524** a gambling-room for the purpose of unlawful gaming at No. 1313 Douglas street, known as "The Diamond Pool Room," and directing him to at once take action to detect all persons there engaged in such violation of the laws of the state and of the city ordinances. A peremptory writ was also awarded against the mayor, commanding him to cause this to be done by the chief of police, and to order the chief of police, and, through him, the officers of the police department to detect and arrest all persons engaged in the violation of the laws of the state at the place designated. The costs of the action were taxed against the respondents, Moores and Donahue.

The mayor and chief of police filed a motion for a new trial, on the grounds that the decision was not sustained by the evidence and was contrary to law; that the findings that relator, Abbott, was acting in good faith and that there was no conspiracy between the relators were contrary to the evidence and not sustained by it; that the peremptory writ does not conform to the alternative one; that the writ requires acts in excess of respondent's duties; that upon the finding that Dunn was not acting in good faith the action should have been dismissed; that under the findings of law made by the court the action should have been dismissed, and that the judgment for costs was unlawful and unjust. From the overruling of this motion the respondents, Moores and Donahue, having filed a supersedeas bond, bring error.

The sole action which the mayor and chief of police are required by the peremptory writ to take is to proceed to use the powers and resources of the police department of the city of Omaha to suppress open violations of the statutes of Nebraska, and of the ordinances of the city of Omaha, in the matter of gambling and conducting a room for the purpose of unlawful gaming at No. 1313 Douglas street in that city. The trial court thought that, under the evidence produced in this case, the mayor and chief of police should be required to do this. They say not, and they give four reasons why this court should reverse ⁵²⁵ the action of the district court and vacate the judgment: 1. That the wrong complained of is not of so grave a character as to warrant interference by mandamus, and to so interfere would be for the court to assume the administrative functions of the municipal government; 2. Other adequate and appropriate remedies exist; 3. It is not the duty of the mayor or chief of police to do the things required; 4. The action was not instituted or prosecuted by the relators in good faith."

The facts seem to be, that at No. 1313 Douglas street, in the city of Omaha, in the back part of a room, whose front is occupied by what is known as the "Diamond Saloon," under license for the sale of intoxicating liquors, and is used for that purpose, is openly and publicly carried on what is called a "poolroom." The dates of races in different parts of the country and the names of horses entered are posted upon a blackboard and, opposite the name of the horse, is posted the odds against his winning in that particular race;

any customer who desires to bet upon any horse pays in his money and receives a ticket entitling him, in the event of that horse's winning, to the odds posted opposite the horse's name on the board.

The trial court found that the business of selling pools on horseraces had been carried on there since some time in January, 1903, up to the trial of the action, which was finished November 30, 1903. The selling and buying of pools on horseracing was found to be betting on the same; the fixtures used in this poolroom, a blackboard and a telegraph instrument, chairs, counters, drawers, books, pencils, tickets, pen, ink and sheets on which memoranda are kept of tickets and pools sold, were found not to be gambling devices within the meaning of the statute. Both the mayor and chief of police were found to have had notice before the bringing of this action that such poolroom was conducted at the place designated, but not actual knowledge of the fact.

The court found, as matters of law, that selling pools upon horseracing is gambling within the meaning of the 526 Nebraska statute; that the keeping and maintaining of a room, where the public is invited to come for such purpose, constitute the offense of keeping a room for gambling purposes within the statutes of Nebraska. It found that it is the duty of the mayor of the city of Omaha to see that the criminal laws of the state and the city ordinances are enforced; that it is his duty, through the chief of police and the police force of the city, to ascertain, where he has reason to suppose such to be the facts, whether or not the laws are being violated, and, if such is the case, he should see that a proper information is filed, and that the persons violating the laws are arrested by the police and prosecuted; and that, in case the chief of police or the police force neglect such duty, it is the mayor's province to order them to do it; that it is the duty of the chief of police of his own volition, if he has cause to believe that the criminal laws are being violated, to make an investigation, and arrest persons found breaking the law, and hold them until a complaint is filed and a warrant issued, and to use all lawful means to bring such parties to trial; that, when a complaint is filed, and a warrant issued, it is his duty to arrest the person charged in the complaint, and investigate and ascertain, as far as he can, whether the offense has been committed; after so doing, he

should submit his proofs to the officer having charge of the prosecution.

Upon these findings the peremptory writ of mandamus against the mayor and chief of police was allowed, and the costs of the action adjudged against them; and, to obtain a reversal of such order, they now urge, as above stated, that there is nothing to warrant the court's interfering with the administrative functions of the municipal government; that other and better remedies exist; that the mayor and chief of police are under no duty to perform the acts required, and that relators are not acting in good faith.

A moving picture was drawn at the argument of the condition of matters in the city of Omaha, if this court were to interfere by mandamus to control the action of the city's police officers in reference to every trifling offense ⁵²⁷ against state laws or city ordinances which may take place there. It seems sufficient to say that the upholding of the mandamus issued by the district court in this case does not commit this court to such a position. This objection merely raises an appeal to the sound discretion of the trial court, and not a bar to the action. No claim is made, or can be made, that these officers have a discretion which the courts may not interfere with, as to whether or not they shall discharge their duties under the law. It is quite true, as stated in *People v. Listman*, 40 Misc. Rep. 372, 82 N. Y. Supp. 263: "The existence, therefore, of the numerous methods described above by which the relator can obtain his object without application to the supreme court is, in itself, no sufficient answer to such an application. But after all the writ of mandamus is an extraordinary remedy, and whether it shall or shall not be granted in a specified case rests largely in the sound discretion of the court. There is no doubt that there are circumstances where such a power may be wisely exercised. It might well be that cases might arise where the neglect of the municipal officer is so flagrant, where the wrong is of so grave a character and where the public interests involved are so important that the court will not hesitate to resort to this remedy. But it should be used with caution. Ordinarily, it is far better that the usual course should be pursued."

The case last cited is reprinted in full in the respondents' brief. In it the New York supreme court, at a special term Am. St. Rep., Vol. 115—39

in Onondaga county, refused a mandamus against a commissioner of public safety of the city of Syracuse, requiring him to enforce general laws prohibiting labor on Sunday, and public dramatic performances on that day. On a complaint made to the commissioner of the character of the performances, he caused two officers to attend one of the performances, which were styled by those conducting them "Sacred Concerts"; on the report of the two officers, the matter was presented to the police justice of the city of Syracuse, who refused to issue a ⁵²⁸ warrant, on the ground that the concerts were not a violation of law. The commissioner declined to do anything further. An application was made for a mandamus to compel him to attend personally, or cause his officers to attend, the concerts, and to arrest, or cause to be arrested, without a warrant, the persons holding them, if they were found to be an offense against the laws of the city. The supreme court in that case adjudges it better that the performances be proceeded against in the ordinary manner because, if the police judge refused to issue a warrant, recourse might be had to any one of the several other magistrates, and the police judge, if necessary, removed.

The case of *Alger v. Seaver*, 138 Mass. 331, is also cited as refusing a mandamus against a municipal officer. The court say: "As applications for the writ of mandamus are addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether the writ shall issue."

The circumstances of this present case have been considered, and the district court, in its discretion, decided that as against the mayor and chief of police the writ shall issue. There certainly does not seem to have been any such abuse of discretion as to call for a reversal of the cause merely because of it. If the duty rested upon the officers to do the things required of them and they were failing in that duty, and the relators are entitled to insist upon its performance, unless there is other clear and adequate remedy, the order allowing the writ should be affirmed.

The second objection is, that there is a clear, adequate and more appropriate remedy existing. To this it seems sufficient to say that the evidence indicates that a number of complaints—one witness for respondents says "eight or ten"—of the violation of law by the conducting of this pool-room have been filed; that arrests have been made, followed

by the prompt release upon bail of the parties charged, and an immediate resumption of the poolroom's ⁵²⁹ business. If the continuance of that poolroom is an open, public violation of the law, the citizens of Omaha, who maintain the police to patrol its streets and prevent such violation, are entitled to have that force used in promptly suppressing such an element of disorder, especially after it appears that ordinary prosecutions do not deter the parties. As Lord Mansfield said of the writ of mandamus: "It was introduced to prevent disorder from a failure of justice, and defect of police": *Rex v. Barker*, 3 Burr. (Eng.) 1266, 1268.

The third objection is, that it is not the duty of the mayor and chief of police to do the acts required. Section 71, chapter 12a of the Compiled Statutes, provides as to the mayor of cities of metropolitan class: "The mayor shall be the chief executive officer and conservator of the peace throughout the city, and shall have power, by and with the concurrence of the board of fire and police commissioners, to appoint any number of special policemen which he may deem necessary to preserve the peace of the city, and to dismiss the same at pleasure." Section 73 makes it his duty to see that the provisions of the law and the city ordinances are enforced. Section 171 of the same chapter provides as to the chief of police: "The chief of police shall be the principal ministerial officer of the corporation; he shall, by himself or by deputy, execute all writs and process issued by the police judge; he, or one of his deputies, shall attend on the sitting of the police court and preserve order therein; and his jurisdiction and that of his deputies in the service of process in all criminal cases, and in cases of the violation of city ordinances shall be coextensive with the county." Section 172: "He shall be subject to the orders of the mayor in the suppression of riots and tumultuous disturbances and breaches of the peace; he may pursue and arrest any person fleeing from justice in any part of the state." Section 173: "He shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities, as sheriffs in similar cases." Among the duties of the sheriff as defined in section ⁵³⁰ 119, article 1, chapter 18 of the Compiled Statutes, are: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, may call any person to their aid; and, when necessary, the

sheriff may summon the power of the county." And section 283 of the Criminal Code provides: "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained."

It seems clear that it is the duty of both the chief of police and the mayor to interfere for the prevention of the public violation of the laws, and that seems to be all which is required of the officers by this mandamus; they are to see that the police officers under their charge investigate the alleged open violation of the law at a given place, and arrest such parties as are found in the act of violating it, and are to take measures for their prosecution. If it be granted, as the trial court found, that an open and public violation of the law is going on there, it would seem that it is clearly within the prescribed duties of these officers to take such steps.

The fourth objection raised is, that the action was not instituted or prosecuted by the relators in good faith. This rests upon the trial court's finding that one of the relators, I. J. Dunn, was influenced in his action more by the desire to "affect" one Thomas Dennison than by a desire to enforce the laws of this state. It was, however, found that, so far as the other relator was concerned, the proceedings were in entire good faith. The soundness of this conclusion is not disputed. The relator, Dunn, owned to having taken, as assistant county attorney, various steps toward the prosecution of Dennison on various actions, and declared that a large share of his desire to suppress the poolroom was from his belief that Dennison shared in its profits. This, no doubt, together with a mass ⁵³¹ of evidence as to Dunn's action as assistant county attorney, the relevancy of which is not perceived, was the basis of the finding, which was in the following terms: "The court further finds, as a matter of fact, that the relator, I. J. Dunn, is not acting in good faith in bringing and prosecuting this action, in this, that he brings and prosecutes this action primarily for the purpose of affecting one Thomas Dennison, and his desire for enforcing the law is a secondary consideration." The court, however, found that the action was not brought nor prosecuted in pursuance of any wrongful conspiracy or combination. The action of the relators seems to have been at the request of a

number of prominent and respectable citizens of the city, and there seems no reason, in the fact that Mr. Dunn was actuated by a conviction that Dennison had an interest in the poolroom and a desire to drive him out of that business, to dismiss the proceedings. It appears from the evidence of Dennison himself that he has no such interest at the present time, and he declares that such action as he has taken in regard to the poolroom was solely on account of friendship for its proprietor, Chucovich. There seems no reason to reverse the action of the district court because of Mr. Dunn's appearance as one of the relators.

The real turning point in the case seems to be the question, whether or not the keeping of a poolroom, such as the evidence discloses, is a violation of the law, the prevention of which the courts will enforce by a writ of mandamus. The officers seem to have regarded it, in the words of police commissioner Broatch, as "no more a violation of law than is the grain bucket-shop." There seems to have been something like an understanding that the city authorities would not, of their own volition, interfere with its operation, if they were conducted without disorderly accompaniments. No attempt, however, is made at the present hearing to defend the lawfulness of this business. No complaint is made as to the correctness of the district judge's findings, that pool-selling is gambling, and that the maintaining of a place where the public are invited to ⁵³² come and buy pools upon races is the maintaining of a gaming-house, under the laws of this state.

All laws for the suppression of vice are subject to evasion. Doubtless gambling is a vice and so distinguishable from crime. Like all other vices, the most that can be done toward its suppression is to prevent its open and public indulgence to the demoralization of society. So long as the laws of the state of Nebraska make the public maintaining of gambling places unlawful, so long it would seem to be the right of citizens, who believe that openly and publicly advertising them and their business is dangerous and demoralizing to the community, to insist that public officers, selected for that purpose, should carry into execution the laws dealing with such places. It seems sufficiently to appear, in the present case, that ordinary remedies had been tried and found powerless to answer the purpose of the statute in question, the closing up of an open and public gaming-house.

It is recommended that the judgment of the trial court be affirmed.

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Question When Mandamus is a proper remedy against public officers is considered at length in the note to State v. Garner, 98 Am. St. Rep. 863.

McCONNELL v. MCKILLIP.

[71 Neb. 712, 99 N. W. 505.]

CONSTITUTIONAL LAW—Police Power—Public Nuisances.—

In the exercise of the police power, the legislature has authority to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize it to be abated summarily, but if property which is innocent in its ordinary and proper use has been used for an unlawful purpose, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such unlawful use without giving its owner an opportunity for a hearing, and a statute thus providing is unconstitutional as depriving such person of his property without due process of law. (p. 622.)

CONSTITUTIONAL LAW—Game Laws.—A statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law, without giving them a hearing, is unconstitutional as depriving such persons of their property without due process of law. (p. 622.)

E. N. Prout, attorney general, N. Brown, W. B. Rose, and C. E. Spear, for the plaintiff in error.

H. C. Vail, for the defendant in error.

712 LETTON, C. On the third day of August, 1902, P. E. McKillip, D. B. McMahon and W. E. Harvey were engaged in hunting prairie chickens in Boone county, in violation of the game law of 1901, using three shotguns. The deputy game warden, Harry L. McConnell, seized the three shotguns, while they were so engaged in hunting prairie chickens. P. E. McKillip was the owner of the guns, which were valued at the sum of seventy-five dollars. McKillip brought an action of replevin against the defendant, deputy

game warden, for their possession. The case was tried to the district court upon an agreed statement of facts substantially as above stated. The court found for the plaintiffs and rendered judgment accordingly. The defendant ⁷¹³ brings error to this court. The game warden claims the right to hold the guns under authority of section 3, article 3, chapter 31 of the Compiled Statutes (Annotated Statutes, 3272), which is as follows: "All guns, ammunition, dogs, blinds and decoys, and any and all fishing tackle, in actual use by any person or persons while hunting or fishing in this state without license or permit, when such license or permit is required by this act, shall be forfeited to the state; and it is made the duty of the commissioner and every officer charged with the enforcement of this act to seize, sell or dispose of the same in the manner provided for the sale or disposition of property on execution, and to pay over the proceeds thereof to the county treasurer for the use of the school fund."

He contends that the statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law is a valid exercise of the police power of the state, while the defendant in error contends that the aforesaid statutory provision violates the provisions of the fourteenth amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and of section 3, article 1 of the constitution of the state of Nebraska, which provides: "No person shall be deprived of life, liberty or property, without due process of law."

The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient times. The theory upon which the law-making power assumes to act is, that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that, consequently, the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference ⁷¹⁴ to a violation of such regulations, as are necessary to accomplish the end desired—the preservation to the people of the state of the pleasure, sport and profit derived from the hunting, pursuit and capture of the wild animals living therein.

In this case the defendant in error, McKillip, admits that it is within the power of the state, in the just exercise of its police powers, to prohibit the killing of fish and game at certain seasons of the year, but denies that it has the right to take his property from him and confiscate it to the state without giving him his day in court. He contends that the police power in regard to the confiscation of guns, dogs, blinds, decoys and fishing tackle is upon exactly the same footing as the police power in regard to the regulation of the sale of intoxicating liquors, and that since, before liquors which have been seized are destroyed, there must be a judicial determination by a court as to whether the owner was engaged in unlawfully selling or keeping for sale intoxicating liquors, so there must be as to his property. He further contends that, since the statute contains no provisions for determining whether the property was liable to condemnation for the criminal acts of those who had it in their possession, and since it merely authorized the game warden to seize the property without warrant or process, to condemn it without proof, and to sell it as upon execution, it deprives the defendant of the property rights which are guaranteed to him by the constitution.

The laws of the state of New York declare that any net or other means or device for taking fish found in the waters of the state, in violation of the laws for the protection of fish, is a public nuisance, and authorize game constables to destroy such nets. Certain nets were seized and destroyed, and an action being brought against the officers for their value under these provisions, the court of appeals of the state of New York held that the declaration by the legislature that the nets or other devices found in the waters of the state are a public nuisance, is a valid ⁷¹⁵ exercise of the legislative power; and that the further provision requiring the destruction of such nets, such destruction being an incident of the power of abatement of the nuisance, and not a forfeiture inflicted as a penalty upon the owner, is not in violation of the constitutional prohibition of taking property without due process of law; but further held that that part of the act authorizing the destruction of nets found upon the shore was unconstitutional, since nets not found in the waters are not a nuisance per se: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134. A writ of error being sued out to the supreme court of the United States

from this judgment, that court affirmed the judgment of the supreme court of New York, and say, Mr. Justice Brown delivering the opinion: "The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. . . . In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the ⁷¹⁶ boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the paths of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed: *Newark etc. R. Co. v. Hunt*, 50 N. J. L. 308, 12 Atl. 697; *Blazier v. Miller*, 10 Hun, 435; *Mouse's Case*, 12 Rep. (7 Coke) 63; *Stone v.*

Mayor, 25 Wend. 157; *American Print Works v. Lawrence*, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420''; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 490, 38 L. ed. 385.

The state of Wisconsin has an act substantially the same as that of New York, providing for the protection of fish and authorizing the destruction of nets, declaring the same to be public nuisances. In the case of *Bittenhaus v. Johnston*, 92 Wis. 558, 66 N. W. 805, 32 L. R. A. 380, the validity of this provision came before the supreme court of Wisconsin. The court say it has been repeatedly said, neither the fourteenth amendment, nor any other amendment to the constitution of the United States "was designed to interfere with the power of a state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity': *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. Rep. 430, 34 L. ed. 519." The court ⁷¹⁷ further say: "The plaintiff, having voluntarily put the nets to an unlawful use which made them public nuisance under the statute, is in no position to recover damages from the defendants for having, as public officials, obeyed the law in abating the nuisance by seizing and destroying the nets. Of course, the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law."

No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the state and sale of property of the kind involved in this case, which has been used in violation of the game laws. As a rule, the statutes have declared nets and like devices, which can only be used in violation of law, to be public nuisances, and provided for their abatement by their destruction by public officers.

The distinction between nets, which under the laws of the states providing for their destruction can only be used for an unlawful purpose, and firearms which under the laws of this and other states may be used for many other purposes, innocent and lawful in their nature, is clearly apparent, and

has been recognized by our legislature in the act under consideration.

In section 1, article 3 of this act, the legislature of this state has provided: "Every net, seine, trap, explosive, poisonous or stupefying substance or device used or intended for use in taking or killing game or fish in violation of this act, is hereby declared to be a public nuisance and may be abated and summarily destroyed by any person, and it shall be the duty of every such officer authorized to enforce this act to seize and summarily destroy the same, and no prosecution or suit shall be maintained for such destruction; provided, that nothing in this division shall be construed . . . as authorizing the seizure or destruction of firearms, except as hereinafter provided."

⁷¹⁸ The provisions of this section as to nets and like devices are substantially the same as those contained in the game laws of New York and Wisconsin, heretofore referred to, and with the conclusions of these courts with reference to laws of like nature, we have no fault to find. But there is a broad distinction between this section and section 3 under which the plaintiff in error justifies.

The legislature has not declared a gun to be a public nuisance and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common-law forfeiture of goods upon conviction of a crime.

In *Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, it appeared that the plaintiff had rented certain boats and nets to a Chinese fisherman; that the property was used in violation of a statute of the state which provided that all nets, seines, fishing tackle, boats and other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited, or may be seized by a peace officer of the county or his assistant, and may be by him destroyed or sold at public auction, upon notice posted in the county for five days. The court held that so much of the statute as authorized the property to be sold without judicial proceedings was unconstitutional and void. It will be noticed that boats were included, which were susceptible of a lawful use.

Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, was an action in conversion to recover the value of certain hogs. The town ordinance provided that it was the duty of the town marshal to take up hogs running at large upon the streets, to advertise them for three days, and to offer them at public sale to the highest bidder, and, after paying the expenses thereof, to pay over to the rightful owner the balance, if ⁷¹⁹ any. The court held the right to forfeit "should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin," and that the ordinance was unconstitutional.

Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420, was an action to recover the value of a dining-table. The defendant pleaded that he was a member of the board of police commissioners of the city of St. Louis, and that under the statute it was his duty, when he had knowledge that there was a prohibited gaming-table kept or used in the city of St. Louis, to issue a warrant directing some officer of the police force to seize and bring before him such gaming-table, and made it his duty to cause the same to be publicly destroyed by burning or otherwise. These provisions were held unconstitutional and void.

In *Lawton v. Steele*, 119 N. Y. 26, 16 Am. St. Rep. 813. 23 N. E. 878, 7 L. R. A. 134, the supreme court of New York was of the opinion that it was only because the nets found in the water were a public nuisance that they might be destroyed, and that if the destruction of the nets was intended as a penalty it was unconstitutional, and also that nets not actually found in the water could not be seized. "But," say the court, "the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance per se, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the en-

forcement of the criminal or quasi criminal law: See opinion of Shaw, C. J., in *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381, and ⁷²⁰ in *Brown v. Perkins*, 12 Gray, 89." When the same case reached the supreme court of the United States, while the majority of the court held that the law in question was a valid exercise of the police power, Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Brown, filed a dissenting opinion, in which he says: "The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard": *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385.

In *Sentell v. New Orleans etc. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693, 41 L. ed. 1169, it is said by Justice Brown: "But in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

In *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 268, a later case than *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, a statute, providing that every vessel unlawfully used in interfering with oysters planted in the waters of the state may be seized by the game protectors, and upon six days' notice a justice might take evidence and, if found to be so engaged, the vessel should be ordered sold and the proceeds paid to the commissioners of fisheries, game and forestry, was held unconstitutional, the court saying: "It is to be observed, in passing, that the use for which vessels and fixtures may be forfeited under this act does not constitute a nuisance, either at common law, or under this or any other statute. Nor is the property itself a nuisance. Hence, it is obvious that the validity of this act cannot be maintained upon the ⁷²¹ ground that either the act or the property is a public nuisance, and, consequently, that the legislature had the power to authorize its abatement."

In *Chicago etc. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481, this court held: "The legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights," but it must appear to the court, when such regulation is called in question, that there is a "clear and real connection between the assumed purpose of the law and its actual provisions."

There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which, therefore, may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged, before the forfeiture takes effect. If the property seized by a game-keeper or warden were a public nuisance, such as provided for in section 1, he had the right, under the duties of his office at common law, to abate the same without judicial process or proceeding, and the great weight of authority is to the effect that such common-law rights have not been abrogated or set aside by the provisions of the constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has a right to deprive the owner of his property, summarily, without affording opportunity for a hearing and without due process of law. The usual course of proceedings in such case has been either, as in admiralty and revenue proceedings, to seize the property, libel the same in a court of competent jurisdiction, and have it condemned ⁷²² by that court, or, as in criminal matters, to arrest the offender and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries. No other has been pointed out to us in the brief of the plaintiff in error. We are therefore constrained to the opinion that, in so far as the section under consideration provides for the seizure, forfeiture and trans-

fer of title to property without a hearing upon the guilt or innocence of its owner, it violates the constitutional provisions. Whether or not a forfeiture can be provided for as a punishment for crime under our constitution is a question not raised or decided in this case.

We recommend that the judgment of the district court be affirmed.

Duffie and Kirkpatrick, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Statute Declaring any net or any other means or device for catching fish in violation of the law for their protection to be a public nuisance, and making it the duty of certain public officers to destroy such nets and devices, is constitutional: State v. French, 71 Ohio St. 186, 104 Am. St. Rep. 770, and see the cases cited in the cross-reference note thereto.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

LLOYD v. HULICK.

[69 N. J. Eq. 784, 63 Atl. 616.]

DEEDS—Reformation of for Fraud.—If a grantor agrees in writing to convey certain lands free from encumbrances, and the grantee, after accepting the deed, discovers that there have been fraudulently inserted therein certain restricting covenants in violation of the terms of the agreement for the deed, with a provision that such covenants should be construed as running with the land, and that upon a violation of either of them the premises should revert to the grantor or his heirs, the grantee is entitled to have the deed reformed by expunging such covenants from it, although they might have been discovered by an examination of the deed before its acceptance. (p. 625.)

T. P. Fay, for the appellants.

Parker & Van Gelder, for the respondents.

784 GUMMERE, C. J. The complainants by their bill seek the reformation of a conveyance of lands made to them by the defendants Peter Hulick, ⁷⁸⁵ Carrie M. Flock and J. W. Flock, her husband. The allegations of the bill are that the defendant Hulick entered into a contract in writing with the complainants, by the terms of which he agreed to convey to them, for a consideration of four thousand dollars, certain lands and premises, which he then owned, in the city of Long Branch, by a deed warranting the lands to be free and clear of all encumbrances; that after making this agreement, Hulick conveyed the lands and premises to his daughter, the defendant Carrie M. Flock, who accepted the conveyance with full knowledge of the existence of the agreement between her father and the complainants and of its provisions; that at the time of making the agreement, and in compliance with one of its terms, the complainants paid to

Hulick the sum of two hundred dollars in cash on account of the purchase money; that upon the day fixed for the delivery of the deed they paid to Hulick the further sum of eight hundred dollars in cash, and executed and delivered to him a purchase money mortgage upon the premises for three thousand dollars; that those payments were made in strict conformity to the provisions for the payment of the consideration money set forth in the agreement; that upon receiving the payment of the eight hundred dollars and the purchase money mortgage, Hulick, together with his daughter, Mrs. Flock, and the latter's husband, executed and delivered to the complainants a deed of conveyance for the property, which they accepted, supposing that it conformed in every particular to the provisions of the prior written agreement; that an examination of the deed discloses that there is inserted in it a covenant restricting the complainants from dividing the land into lots less in size than one hundred by two hundred feet, or from erecting a house upon said premises costing less than five thousand dollars; also a covenant restricting the complainants from selling any portion of the premises to any person of African descent, and in addition, a provision that each of these covenants is to be construed as running with the land, and that upon a violation of either of them by the complainants the premises shall revert to the grantors or their heirs. The bill then alleges that these provisions were inserted in the deed by the defendants for the purpose of evading the performance of the agreement ⁷⁸⁶ according to its terms and to prevent the complainants from obtaining the full benefit thereof. The relief sought is the expunging from the deed of all these restrictive covenants. A demurrer was interposed by the defendants upon the ground that the bill did not disclose a case which entitled the complainants to relief. Upon hearing an order was entered overruling the demurrer, from that order this appeal is taken.

The facts recited in the bill present a case which entitles the complainants to relief. Upon payment of the consideration provided by the agreement they were entitled to have delivered to them by the defendants a conveyance which should conform to the terms of that agreement. The intentional insertion in the deed by the defendants of the restrictive covenants set forth in the bill was in fraud of that right.

Its delivery by the defendants to the complainants without a disclosure of the fact that it contained these covenants was equivalent, it seems to me, to a declaration on their part that the deed was drawn in conformity to the provisions of the contract. It is true that the complainants might readily have discovered, by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business, men ordinarily deal with one another in the belief that each is honest. If the opposite belief prevailed in such dealings attempted frauds would rarely be successfully carried into execution and courts would seldom be called upon to grant relief against them. Failure to discover an intended fraud before it has been actually perpetrated must necessarily exist in every case where the courts are appealed to to relieve the wronged party from its effects, and the fact that the exercise of a greater degree of prudence on the part of him who has been defrauded would have prevented the fraud from being successfully carried through affords no ground for refusing relief.

The effect of the restrictive covenants contained in the deed is beyond question to reduce materially the value of the granted ⁷⁸⁷ premises in the hands of the complainants, and upon the facts stated in the bill they are entitled to have the deed reformed by expunging them from it.

The order overruling the demurrer should be affirmed.

When Fraud is Practiced in drawing and executing an instrument so that it does not speak the real terms of the contract which the parties have agreed upon, this may constitute ground for a reformation of the instrument in equity at the suit of the party who is deceived and prejudiced in his rights: See the note to *Williams v. Hamilton*, 65 Am. St. Rep. 497.

The Failure to Read a Contract Before Signing it does not affect its validity, as a rule, if the person signing is able to read and write, and there is no fraud or misrepresentation: *Chicago etc. Ry. Co. v. Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187. But if false representations are made of such a character as reasonably to excuse one from reading a proposed contract, and he is thereby induced to sign it without knowledge of its contents, he may rescind it by acting seasonably: *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016, and see the cases cited in the cross-reference note ~~therein~~.

BOGART v. STEVENS.

[69 N. J. Eq. 800, 63 Atl. 246.]

MORTGAGES—Assignment.—A mortgage delivered to a third person without consideration, in order that he may procure money thereon for the mortgagor, is valid in the hands of such third person's assignee, for the money paid therefor by the latter, although the former fails to pay over the money to the mortgagor. (pp. 627, 628.)

S. W. Beldon, for the complainant.

W. J. Miller and H. O. Hance, for the defendants.

⁸⁰⁰ DIXON, J. The object of the bill in this case is to foreclose a mortgage dated October 31, 1902, given by Mary G. Stevens and Will A. Stevens, her husband, to Jesse Price and his wife, purporting to convey real estate belonging to Mrs. Stevens, in order to secure a bond of the same date made by Mr. and Mrs. Stevens, conditioned for the payment of three thousand dollars, to Mr. and Mrs. Price, on October 31, 1903. On October 27, 1903, the bond and mortgage were duly assigned by Mr. and Mrs. Price to the complainant.

The defense interposed is that the bond and mortgage were given for the purpose of raising three thousand dollars in cash, which was to be paid to Mrs. Stevens, and which she was then to loan to the president of the Snow-Church Surety Company on his giving to her ample security for repayment, and that she had never received any part of the sum mentioned.

⁸⁰¹ The learned vice-chancellor to whom the cause was presented in the court below accepted this defense as substantially proved, but he also found that, in an arrangement made January 15, 1903, Mrs. Stevens had ratified the mortgage as security for an advance of eight hundred dollars made to the Snow-Church Surety Company on the strength of the mortgage, and thus it had become enforceable against her estate for that sum. Then, applying the doctrine that the assignee of a mortgage holds it subject to the defenses that could be made against the assignor, he advised a decree in favor of the complainant for eight hundred dollars only.

From this decree the complainant appeals. In thus limiting the claim of the complainant the learned vice-chancellor overlooked, we think, the due effect of two important facts.

As before stated, the nominal mortgagees were Mr. and Mrs. Price. The defendants, in their answer to the bill, allege that the bond and mortgage were delivered to Mr. and Mrs. Price by Mr. Stevens upon the promise that Mr. Price would obtain the sum mentioned in those instruments and turn it over to Mr. Stevens in cash, and Mrs. Stevens, while testifying as a witness in the cause, on being asked why the names of Mr. and Mrs. Price were used, replied that she did not know as to Mrs. Price, but that Mr. Price was thus included because he was to obtain the money for her. Hence it is evident that Mr. Price was authorized by both Mr. and Mrs. Stevens to assign the bond and mortgage for cash.

On receiving the assignment the complainant paid to Mr. Price three thousand dollars in cash, and thus the latter carried out the very purpose for which the instruments had been executed in the form adopted. Consequently, even if we assume that the mortgage, before assignment to the complainant, was invalid as a security or was valid for eight hundred dollars only, it became valid on such assignment for the full amount then paid by him. As was said by this court in *Sweeney v. Williams*, 36 N. J. Eq. 627: "Although the contract, as between the parties, was wholly without consideration, yet, if made for assignment and if assigned for a consideration, the latter became the consideration of the original contract."

⁸⁰² The obligation of Mr. Price, if any existed, to account to Mr. and Mrs. Stevens for the money received, was a matter in which the complainant had no concern. They had clothed Mr. Price with the semblance of absolute ownership of the mortgage and had given him authority as owner to assign it for cash, and consequently a payment made to him by an assignee, who was unaware of the duties of the agent, had the same force as if the payment had been made to the principals: *Story on Agency*, c. 16, secs. 429, 430.

The decree appealed from should be reversed, and a decree entered in accordance with this opinion.

For Authorities bearing upon the principal case, see *Tompkins v. Triplett*, 110 Ky. 824, 96 Am. St. Rep. 472; *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639; *Morgan v. Neal*, 7 Idaho, 629, 97 Am. St. Rep. 264.

COGAN v. CONOVER MANUFACTURING COMPANY.

[69 N. J. Eq. 809, 64 Atl. 973.]

ASSIGNMENTS—Accounts not Yet Due.—An absolute assignment of an account not yet due does not constitute a mere covenant to pay out of the fund, even if the assignor therein agrees to act as agent of the assignee in collecting the money. (p. 631.)

ASSIGNMENTS—Money not Yet Due.—An equitable assignment of money to be earned operates upon the fund as soon as it is earned. (p. 632.)

ASSIGNMENTS of Accounts not Yet Due.—If a manufacturer assigns as collateral security for his debt the first payment on a contract for two implements to be made by him, and one of the implements is substantially completed and delivered to the purchaser prior to the appointment of a receiver for the manufacturer, and the price is subsequently paid to such receiver, the assignee is entitled to such fund so far as necessary to pay the debt secured. (p. 632.)

ASSIGNMENTS—Notice to Debtor.—As between the assignor and assignee and those standing in the shoes of the assignor, notice of the assignment to the debtor or holder of the fund is not necessary. (p. 633.)

CONVEYANCES—Withholding from Record—Fraud.—The retention of personal property and the withholding of conveyances from record do not make the transfer void as to general creditors in the absence of fraud. (p. 634.)

Collins & Corbin, for the appellant.

J. M. Lane, for the respondent.

810 SWAYZE, J. The Greenville Banking and Trust Company claims a right to have certain debts due it from the Conover Manufacturing Company paid in full by the receiver out of moneys in his hands, upon which it claims a lien by reason of assignments from the insolvent corporation. This claim was rejected by the receiver, and his decision was affirmed by the vice-chancellor.

The determination of the case depends upon the construction of two documents signed by the Conover company, which read as follows:

“January 5th, 1904.

“In accordance with a resolution passed by the board of directors at a meeting held this date:

“We hereby assign to the Greenville Banking and Trust Company as collateral security the sum of thirty-seven hundred and eighty (\$3,780) dollars out of an order from the Public Service Corporation of New Jersey.

"We agree to act as agent of said Greenville Banking and Trust Company in collecting this money, and agree to turn it over to them immediately on receipt of same in such sums as it may be received.

"This \$3,780 is the balance remaining of our final payment of \$6,300, after deducting \$2,520 which has already been assigned to said Greenville Banking and Trust Company."

"Jersey City, N. J., April 26th, 1904.

"We hereby assign and transfer to the Greenville Banking and Trust Company the first payment of eighty-two hundred and fifty (\$8,250) on contract with the Public Service Corporation of New Jersey, amounting to sixteen thousand five hundred (\$16,500), and we authorize the Public Service Corporation of New Jersey to make above payment, when due, direct to the Greenville Banking and Trust Company."

§11 It is not questioned that the execution of these papers was duly authorized by the board of directors of the Conover company.

The questions which arise under the two papers are somewhat different, and I deal with them separately, in the order of their dates.

Prior to January 5, 1904, the company had contracts with the Public Service Corporation amounting to \$25,200, and had assigned to the trust company as security \$10,000 of the amount. On January 5, 1904, \$18,900 of the total had been paid by the Public Service Corporation, of which the trust company had received its due proportion, \$7,500. There was still due or to grow due from the Public Service Corporation \$6,300, of which the trust company's proportion was \$2,500. The intent of the paper of January 5th was to cover the balance of the money to grow due, as clearly appears from the recital in the last paragraph. There was an error in assuming that \$2,250 was payable to the trust company under the earlier assignment. The real amount was only \$2,500, and the actual balance remaining of the final payment was \$3,800, instead of \$3,780, but the intent is so clear that we think the paper is to be construed as including the whole balance.

The first objection made to the claim of the trust company is that the paper does not amount to an assignment, but is a mere covenant to pay out of the proceeds of the contract with the Public Service Corporation. We do not question the dis-

inction between the rights acquired under a mere covenant to pay and under an assignment. In our judgment the paper now in question amounts to an assignment. There is an "actual appropriation which confers a present right on the assignee, although the circumstances may not admit of its immediate exercise": 2 Lead. Cas. Eq. 1644. The language of the paper is that of an absolute assignment, and the fact that the Conover company also agrees to act as agent in collecting the money does not militate against the plain construction of the preceding paragraph. The Conover company does not thereby retain authority over the fund. Whatever it may do is to be done not in its own right,⁸¹² but as agent, and the very fact that it agrees to act as agent precludes the construction that the fund is to remain its own, or subject to its control except as agent.

The fact that the money was not yet due affords no argument against our construction. Such is the ordinary case of an equitable assignment. The very fact that the money is not due so that the assignment is not effective in a court of law is sometimes relied on to give jurisdiction to the court of equity: *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171, affirmed by this court on the vice-chancellor's opinion; *Lyon v. Bower*, 30 N. J. Eq. 340.

It is argued that the only effect of the assignment was to secure a loan of \$3,780, made two days after its date, and that as that loan was afterward paid, the right of the trust company to the amount assigned was at an end. We do not so read the assignment. The language is general and the debt secured is not specified. The new loan probably was the inducement to the Conover company to make the assignment, but it was not extraordinary for them to agree with the trust company that the fund should be held as security generally. We think they did so agree.

There is in the hands of the receiver \$2,100, the proceeds of this account. The debts from the Conover company to the trust company which were in existence on January 5, 1904, exceed that amount. The trust company is entitled to the fund.

The only authority for the assignment of April 26, 1904, is a resolution of the board of directors, which authorized a loan of \$5,470 from the trust company and an assignment of such contract or contracts of the company as might be necessary to further secure the loan. It is now urged by the trust

company that the president of the Conover company had power by virtue of his office to assign this fund generally as security for the indebtedness. The evidence does not justify this conclusion. The parties relied upon the resolution of the board as the authority for the assignment, and that limited the power to securing the loan of \$5,470.

⁸¹³ The resolution authorized an assignment of the contract and not in terms of the money to be earned, but we agree with the vice-chancellor that the evident intent of the resolution was to authorize an assignment of the fund, and that was actually done in terms by the paper of April 26th. This was an equitable assignment of money to be earned, and operated upon the fund as soon as it was earned: *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171; affirmed, *Lyon v. Bower*, 30 N. J. Eq. 340; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; affirmed, *Pisborough v. Pisborough*, 48 N. J. Eq. 646, 25 Atl. 20; *Terney v. Wilson*, 45 N. J. L. 282.

Whether the fund was earned by the Conover company was one of the disputed questions, and was decided by the vice-chancellor adversely to the claim of the trust company. The solution of the question depends on the facts of the case.

The contract was for two condensers for a price of \$16,500. payable one-half cash on bill of lading or when condensers were ready to ship, thirty per cent in thirty days thereafter, and the final payment on erection and test, not later than ninety days from the time the condensers were ready for shipment. One condenser was completed and, with the exception of certain attachments, delivered prior to the appointment of the receiver. The other was completed by the receiver at a cost of \$3,000. Both were paid for by the Public Service Corporation.

It is necessary to decide upon the respective rights of the receiver and the assignee where the work contracted for has not been completed at the time the receiver is appointed and where no debt exists to which the assignment can attach until work has been done by the receiver.

In the present case one condenser had already been completed and delivered to the purchaser, which recognized its liability by subsequently paying therefor in full. To the extent of the value of the one condenser the money was earned by the Conover company. It was at the time of the appointment of the receiver an account receivable. Even if the con-

tract was an entire contract for two condensers, the delivery to and acceptance by the Public Service Corporation made that corporation liable for the price. The amount paid afterward for this condenser, which was the ⁸¹⁴ first delivered, may fairly be regarded as the first payment on the contract, within the meaning of the assignment of April 26th.

It is now argued that the assignment was not effective because notice was not given to the Public Service Corporation. As between the assignor and assignee and those standing in the shoes of the assignor, notice to the debtor or holder of the fund is not necessary. The English cases to that effect are *Beavan v. Lord Oxford*, 6 De Gex, M. & G. 507, where *Watts v. Porter*, 3 El. & B. 743, is disapproved; *Pickering v. Ilfracombe Railway Co.*, L. R. 3 C. P. 235; *Crow v. Reeves*, L. R. 3 C. P. 264; *Scott v. Lord Hastings*, 4 Kay & J. 633. Cases in which notice to the debtor or holder of the fund becomes important are cases where the question is one of priority between different assignees, as in *Loveridge v. Cooper*, 3 Russ. 30, and *Dearle v. Hall*, 3 Russ. 1, and cases arising under the English bankruptcy acts, *Ryall v. Rowles*, 2 Lead. Cas. Eq. 1533.

The object of notice is discussed by Vice-Chancellor Pitney, in *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922, and his view was approved by this court in *Miller v. Stockton*, 64 N. J. L. (Vroom), 614, 46 Atl. 619, where Justice Lippincott distinctly said that notice was not an essential part of the assignment.

The controversy in this case is between the receiver of the assignor on one side and the assignee on the other. The receiver represents the creditors, but the creditors as such have no lien upon the fund. Their position is not as favorable as that of the judgment creditor and the attaching creditor in the English cases above cited.

One of the reasons urged for postponing the claim of the trust company to the claim of the general creditors is that the failure to notify the Public Service Corporation gave the Conover company a delusive appearance of credit, like the retention of the possession of personal chattels and the withholding from record of a conveyance. There is no proof that any creditor was actually misled, and it is by no means certain that a notice to the Public Service Corporation prior to the time when the debt came ⁸¹⁵ into existence, on the eve

of the appointment of the receiver, would have been effective. The retention of possession of personal property and the withholding of conveyances from record do not necessarily make the transfer void as to general creditors. That result is reached only in cases of fraud: *Pancoast v. Miller*, 29 N. J. L. 250, 24 Atl. 928; *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244; affirmed, *Dixon v. Bently*, 50 N. J. Eq. 486, 27 Atl. 636.

There is no evidence of fraud in the present case.

It is also argued that the assignments are invalid because the company was insolvent at the time, but the proofs fail to disclose a condition of insolvency. The case is much stronger than *Regina Music Box Co. v. Otto*, 65 N. J. Eq. 582, 56 Atl. 715, which has since been affirmed by this court.

We think the assignment of April 26, 1904, entitled the trust company to be paid the amount of the note for \$5,470, dated April 20, 1904, out of the money paid the receiver by the Public Service Corporation.

The result is that the decree must be reversed and the record remitted to the court of chancery for further proceedings in conformity to this opinion.

The Assignment of Demands Yet to Become Due is considered in the notes to *Field v. Mayor*, 57 Am. Dec. 440; *Lowery v. Steward*, 82 Am. Dec. 349; *Harris County v. Campbell*, 2 Am. St. Rep. 474. An order to pay to a person therein named the whole of a particular fund yet to become due upon the performance of an existing contract operates, not only as between the drawer and payee, but also as to the drawee, as an equitable assignment of the fund to the payee: *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77.

The Question Whether Subsequent Assignees of Accounts and claims can obtain precedence by first giving notice is considered in the note to *Graham Paper Co. v. Pembroke*, 71 Am. St. Rep. 31.

MOORE v. DURNAN.

[69 N. J. Eq. 828, 65 Atl. 463.]

EQUITY JURISDICTION—Lost Checks.—A court of equity has jurisdiction to entertain a suit for the recovery of the amount due upon a lost check, not negotiable for lack of indorsement. (p. 635.)

M. P. Devlin, for the appellant.

W. J. Backes, for the respondent.

⁸²⁸ Per CURIAM. The bill in this case was filed to compel the appellant, Durnan, and the Broad Street National Bank, of Trenton, to pay to Moore, the respondent, the amount of a lost check, drawn by Durnan, to his own order, upon the bank, and delivered by him to the agent of Moore, without indorsement, as a part of the purchase money for premises agreed to be purchased by Durnan from Moore, and which agreement Durnan subsequently refused to perform. The liability of the bank was rested upon the fact that before the delivery of the check to the agent of Moore, the bank had certified it "good when properly indorsed." The decree under review adjudges that "the said Charles B. Durnan and the said The Broad Street National Bank of Trenton do pay to the said complainant the sum," etc. This adjudication carries with it, by necessary inference, the conclusion that a certification by a bank that a check, drawn to the order of the ⁸²⁹ maker, is good when properly indorsed by him, renders the bank jointly liable, with the drawer, to an assignee of the check, although the instrument has not been indorsed by the maker. As Durnan is the only appellant, the correctness of the conclusion of the vice-chancellor on the question of the liability of the bank is not before us for our consideration.

We concur in his conclusion that a court of equity has jurisdiction to entertain a suit for the recovery of the amount due upon a lost check, which is not negotiable for lack of indorsement, and establishing the liability of Durnan upon the note in suit.

The decree appealed from will be affirmed.

Actions on Lost Instruments are discussed in the note to *Matthews v. Matthews*, 94 Am. St. Rep. 464.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

**NORTH CAROLINA CORPORATION COMMISSION v.
ATLANTIC COAST LINE RAILROAD COMPANY.**

[137 N. C. 1, 49 S. E. 191.]

RAILROADS—Regulation of by State Commission.—The state corporation commission, in the exercise of the police power of the state, has power and authority to require two railroad companies to make connection at a certain station at a certain time. (pp. 649, 650.)

JUDGMENTS—Power of Supreme Court to Enter.—When the supreme court reverses or affirms the judgment of the court below, it may, in its discretion, enter final judgment therein or direct it to be so entered in the court below. (p. 652.)

R. D. Gilmer, attorney general, Busbee & Busbee, E. A. Woodard and Argo & Shaffer, for the plaintiff.

J. Davis and Pon & Fuller, for the defendant.

² **CLARK, C. J.** It appears from the record that for some ten years prior to October 11, 1903, the passenger traffic from a large portion of eastern North Carolina to Raleigh and the adjacent central part of the state was made by the defendant Atlantic Coast Line Railroad Company connecting with the Southern Railway at Selma at 2:50 P. M. daily. For a year or two prior to that day the connection became very irregular, to the great inconvenience of the traveling public, passengers frequently being compelled to lie over at Selma till 11 o'clock at night, and then forced to take a mixed train with uncomfortable accommodations to go westward. The Southern Railway finding its time between Goldsboro and Greensboro, thirty-eight miles per hour, dangerous on account of the condition of its track, had also lately changed its

schedule to leave Goldsboro thirty minutes earlier. The matter being called to the attention of the corporation commission, it attempted to remedy the evil. After much correspondence with the officials of both roads the commission, on December 8, 1903, made the following order:

"Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day; and whereas, it appears that such close connection is practicable, it is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 P. M. each day instead of 2:50 P. M., as the schedule now stands. It is further ordered that if the Atlantic Coast Line trains have passengers en route for the Southern Railway and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait fifteen ³ minutes for such delayed trains upon receipt of such notice. This order shall take effect December 20, 1903.

"By order of the Commission:

"FRANKLIN McNEILL, Chairman.

"H. C. BROWN, Clerk."

This order quickened the arrival time of the Atlantic Coast line train at Selma twenty-five minutes, but as it required the Southern to wait at that point fifteen minutes for delayed trains, it more than divided the time between the roads, exacting only ten minutes advance of time on the part of the defendant to procure this convenience to the traveling public. On December 18, 1903, on the application of counsel for the defendant, the order was suspended and both companies were notified to appear before the corporation commission at Raleigh on January 12, 1904, that "the matter of the connection at Selma of the Atlantic Coast line going south with that of the Southern Railway going west in the afternoon" might be heard, and asking both companies to have representatives present. The defendant appeared by its superintendent and its general counsel, and the other company was also represented. After hearing both sides, "the situation being thoroughly discussed," the commission took the matter under advisement. On January 1, 1904, the commission rendered a full finding of the facts, concluding with this judgment:

"And it is therefore ordered that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 and by and before 2:25 P. M. each day. It is further ordered that the Southern Railway hold its train, No. 135, at Selma fifteen minutes, if for any reason the Atlantic Coast Line train connecting at that point is delayed." It was further ordered that the order should take effect January 26, 1904. To this judgment the Southern Railway Company did not except. The Atlantic Coast line filed five exceptions: 1. That it was not practicable to make the connection at Selma by extending the run of either its Plymouth or its Springhope train to Selma; 2. That it would be unprofitable and a loss for it to make the connection by putting on an additional train from Rocky Mount to Selma; 3. The commission has no power to require it to put on extra trains; 4. That it is not practicable to make the connection without putting on an extra train, which the commission has no power to do; 5. That the order is unreasonable because passengers from Rocky Mount can make connection at Goldsboro at 6:50 A. M. or at Selma by night train over the Southern, or they could go up to Weldon and go over the Seaboard Railroad. A letter in the record from the transportation department of the defendant company, dated January 23, 1904, states that prior to the breaking of connection at Selma the defendant's 2:50 P. M. train transported on an average of twelve passengers daily for the Southern at Selma, while since the average was only two. This shows three thousand six hundred and fifty passengers annually inconvenienced by the failure to connect at that point. There is evidence elsewhere in the record that it was a very much larger number. On February 2, 1904, the exceptions were heard by the commission upon the testimony of witnesses offered by the defendant, and other evidence. Upon all the evidence and after argument by counsel for the defendant, the commission, February 13, 1904, made a fuller finding of fact, in the course of which it is recited, *inter alia*, that by the connection at Selma at 2:50 P. M. between the Atlantic Coast line train No. 39 (southbound) and the Southern train No. 135 (westbound), "the greater portion of the section of the country reached by the said branch roads was for years furnished the nearest and cheapest route of travel to Raleigh and other Southern Railway points. The greater por-

tion of the travel between the Atlantic Coast line territory and the Southern Railway points was by this route. * It is admitted in the correspondence of the Atlantic Coast line in this matter that this was a most important connection, being the principal outlet for passengers en route from eastern Carolina territory to Raleigh and other Southern Railway points. There seems to have been no complaint about the failure of these railroad companies to keep this schedule and make this connection until about the year 1900. The Atlantic Coast line informs the commission that 'this matter has been a frequent source of correspondence between this company and the Southern Railway Company since 1900, and that during this time frequent complaints have been made to this company by the Southern Railway Company of its failure to make schedule time at Selma.' "

The commission found, giving its reasons, that passengers ought neither to be required to go a much longer distance around by Weldon nor to make connection at unreasonable hours at Goldsboro (6:50 A. M.), nor take a night train (11 P. M.) connection at Selma, when a few minutes quickened time would maintain the connection which had been made at Selma in the early afternoon for more than ten years. The commission also found that the defendant could make the connection, if it chose, by extending the run of its Springhope train which, coming down nineteen miles from that place, reached Rocky Mount at 12:10, where it lay over until 4 P. M. before returning to Springhope, during which four hours it could easily be run forty-one miles and back, making this connection. It thus concludes its judgment:

"There is within the territory served by these branch lines approximately four hundred thousand inhabitants. The report of the Atlantic Coast line to this commission for the fiscal year ending June 30, 1903, shows net earnings from operation in North Carolina amounting to \$1,943,116.63, and that there was a surplus of \$1,293,983.54 after paying interest on its debts and five per cent dividends on its stock, both common * and preferred, from the net earnings of the company's entire line. On a mileage basis, this will show that there was a surplus of net earnings in North Carolina for that year of approximately \$324,493. The commission is of the opinion that the facilities given heretofore by the Atlantic

Coast line to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk and Carolina branch, the Plymouth branch and the Nashville branch with No. 135 Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma for nearly ten years should be restored; that if this cannot be done by the Atlantic Coast line train No. 39 as formerly, on account of this train being heavier, containing usually one or more express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from eastern Carolina to Selma and other Southern Railway points for the last ten years, instead of being abandoned should be made permanent and certain, and that this result be accomplished by carrying out the order heretofore made in this court. It is ordered, therefore, that the exceptions be and they are hereby overruled.

FRANKLIN MCNEILL,

"Chairman."

From this order, thus repeated the third time, and after the fullest investigation, occupying several months, the defendant appealed to the superior court. In that court the following issues were submitted, the corporation commission excepting:

"1. Is it practicable for train No. 39 of the Atlantic Coast line, due to arrive at Selma at 2:50 P. M., to make connection ⁷ at Selma with train No. 135, westbound, of the Southern Railway, due to leave Selma at 2:25 P. M.?

"2. Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return, and if so what would be the additional expense?

"3. Is it practicable to make said connection by the use of the Springhope train, and if so what would be the additional expense?

"4. In order to make such connection, would the defendant company have to run an additional train on its main line from Rocky Mount to Selma?"

The court directed the jury to answer the first three issues "No," and the fourth issue "Yes," and the corporation com-

mission excepted. The following issues the jury were permitted to answer, to which they responded as follows:

"5. Is it practicable for said train to run the schedule prescribed in the plaintiff's order, having due regard to the number of trains and number of stops on the defendant's main line from Rocky Mount to Selma? 'Yes.'

"6. What would be the daily cost of operating such train from Rocky Mount to Selma and return? 'Forty dollars.'

"7. What would be the probable daily receipts from such train? 'Twenty-five dollars.'

"8. Is it reasonable and proper that for the convenience of the traveling public the defendant company should be required to make such connection? 'Yes.' "

Upon the verdict the corporation commission moved for judgment, but the court rendered judgment for the defendant, giving as a reason that the Code of 1883, section 1957 (9), gave to railroad companies the right to regulate "the time and manner in which property and passengers shall be transported," and that it had been unable to find where this had been repealed; that he was of opinion that the statute had not conferred any power upon the corporation commission ⁸ to order any connection to be made between the trains on connecting railroads, and hence he refrained from passing upon the defendant's further contention that the General Assembly had no constitutional right to grant such power. The corporation commission appealed, assigning several grounds of error which will appear in the opinion.

For more than ten years the people of a large part of the eastern portion of the state, having occasion to come to the capital or to the adjacent central section, have found their most direct and convenient route to be via Selma, at which point by its schedule the southbound train No. 39 of the defendant Atlantic Coast line, delivered its passengers at 2:50 P. M. daily in time to connect with the Southern Railway westbound train No. 135 from Goldsboro to Greensboro. On October 3, 1903, the Southern notified the corporation commission that owing to the condition of its track it was dangerous to maintain its speed—thirty-eight miles per hour—on its train No. 135, and proposed to leave Goldsboro thirty minutes sooner, which would cause its arrival a few minutes earlier at Selma. This the commission found to be proper

and reasonable. It was brought to the attention of the commission by proper complaint made, that for many months the Atlantic Coast line had failed to make this afternoon connection regularly at Selma at its schedule time to the great inconvenience of the traveling public, and it was asked to order the afternoon connection to be resumed and observed. After much correspondence with the officials of both roads the commission, on December 8, 1903, ordered that the afternoon connection should ⁹ be made, and to that end directed that the defendant should quicken its schedule so as to arrive at Selma at 2:25 instead of 2:50 P. M. as before, an advance of twenty-five minutes, but as the same order required the Southern train to wait fifteen minutes whenever the Atlantic Coast line was delayed for any cause, the order practically required the defendant to arrive ten minutes earlier. Objection being taken, the order was suspended and both companies were summoned before the corporation commission, and after investigation and argument on January 16, 1904, the order was renewed. The Southern thereupon acquiesced in the order. The defendant alone filed exceptions, upon which testimony and argument were heard and the commission renewed its order in the same terms, February 13, 1904. On appeal by the defendant to the superior court, there were sundry issues submitted over the exception of the corporation commission. But as the order of the commission appealed from simply directed the connection to be made as in former years, prescribing no details of the method (which was left to the judgment of the defendant itself) save an acceleration of twenty-five minutes, subject to a delay of the Southern train of fifteen minutes, when the defendant's train should be late, we think the matter could have been and was fully disposed of by affirmative response of the jury to the eighth issue—"Is it reasonable and proper that for convenience of the traveling public the defendant company should be required to make such connection?"—taken together with the findings upon the sixth and seventh issues, that even if an additional train should have to be put on between Rocky Mount and Selma, the loss to the defendant would be fifteen dollars per day (which might be overcome by the increased travel induced by certainty of connection), and the official returns made by the defendant to the commission June 30, 1903, as required by law and which are in the evidence, that

the net earnings of the defendant from its operations ¹⁰ in North Carolina amounted for the year ending June 30, 1903, to \$1,903,116.63, with a surplus of nearly \$1,300,000 after paying interest on its debts and five per cent dividends on its stock, both common and preferred, from the net earnings of the entire line. It is surely sufficiently large, as it stands, to justify the affirmation of the order of the corporation commission that this great inconvenience to the public should be avoided, even at a cost to the defendant of fifteen dollars per day, when the net earnings of the defendant from all its operations in this state approximate \$2,000,000 annually, and the net surplus of the defendant's whole system, after payment of interest on its debts and dividends on its stock (whether watered or not), amounts to near \$1,300,000 annually. And upon such verdict the judge below should have entered judgment affirming the order of the corporation commission, and we should reverse his judgment and enter such judgment here, provided (1) the legislature has conferred such authority upon the commission, (2) and the legislature was not restrained by any provision of the state or federal constitutions from granting such authority. Mr. Davis, the able and accomplished counsel of the defendant, states this clearly in his brief: "The defendant's contentions in brief are as follows: 1. That the corporation commission had no power or authority to make the order in question in this cause; 2. That the order is in violation of the constitution of the United States and the state of North Carolina; 3. That the order is unreasonable and unjust." His third contention is settled by the verdict and finding as above stated. As to the first proposition, we think the General Assembly clearly intended to confer, and did confer, the power upon the commission to order connection made by any two railroads when the public convenience required it, and the order was just and reasonable. This is not an arbitrary power, for, as in this case, such order is subject to review ¹¹ by a judge and jury on an appeal to the superior court, whence a further appeal lies to this court.

Section 1 of the corporation commission act (Acts 1899, c. 164), in enumerating the qualifications, the duties and powers of the commission, provides that "they shall have such general control and supervision of all railroad . . . companies or corporations and of all other companies or corporations en-

gaged in the carrying of freight or passengers . . . necessary to carry into effect the provisions of this act." Section 21 of the act provides that: "All common carriers subject to the provisions of this act shall, according to their powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith, . . . and connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public." This provision is positive, clear and mandatory. Common carriers are (1) to afford all reasonable, proper and equal facilities for the interchange of traffic and forwarding freight and passengers. This would include both the place and time of delivery and forwarding of passengers and freight. The terms of the law are general, and cannot be interpreted to mean alone the place at which passengers and freight are to be delivered; it does not mean simply facility for delivery which might be confined to the place, but also requires facility for forwarding which includes time as well, and prohibits such management as would produce delay in forwarding passengers. This requires close connection in point of time with connecting lines. (2) In the second place, common carriers are "to make as close connection as practicable for the convenience of the traveling public." The defendant insists that this last requirement means simply a physical connection, that is, a track connection. It is contended that ¹² the demands of the law would be met by a simple joining of the railroad iron of one railroad to that of another, regardless of the time of the delivery of passengers at the junction, and of their finding the means of "traveling" on or continuing their journey, and of the delays and inconveniences resulting from a failure to make connection of trains. The statement of this proposition, even if the acts were ambiguous, contains its own refutation. But the language is plain and unequivocal, and, as Mr. Argo, of counsel for the commission, well says, "The requirement is that 'connecting lines shall make as close connection as practicable for the convenience of the traveling public.' This means that those railroads that have or pretend to have a physical connection, a connection of tracks, shall also have as close a connection of trains as practicable, in order to secure the convenience of the 'traveling pub-

lic.' It is well known that the principal inconvenience attendant upon traveling arises from delays resulting from failure of trains to connect according to time schedules. It would contribute little to the convenience of the traveler to be dumped out upon a track making a 'physical connection' and be compelled to wait for hours, frequently without food or shelter and in the night, for a train upon which he might proceed on his way. The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track; both are required to furnish facilities for traveling at all, and a close connection of both to secure the convenience of the traveling public."

It is true that section 1957 (9) of the Code of 1883, originally enacted in 1871-72, gave to railroad companies themselves the right to "regulate the time and manner in which passengers and property shall be transported," but by the act of 1891, chapter 320, creating a railroad commission, the state made a radical change in its attitude toward railroads. ¹³ It asserted its power to supervise and regulate their conduct, forbade discrimination and issuance of free passes, conferred upon the railroad commission the power to regulate and to fix their charges for freight and passengers, to prohibit rebates, to make joint through rates, to make personal visitation of all railroad offices and places of business, to examine their officers, agents and employés under oath, to require all contracts and agreements between railroads, as to their business in this state, to be submitted for approval, to require annual reports from the railroads, to require the railroads to make repairs to their tracks and additions to or changes of their stations, forbade the abandonment of any station without the permission of the commission, to require (if the commission saw fit) separate accommodations for the races at the stations and in the cars, and "that connecting lines shall be required to make as close connection as practicable for the convenience of the traveling public," and many other matters which before that had been left to the railroads themselves. This act was passed after the fullest discussion for years before the people of the state. It expressed their deliberate conviction that the time had arrived when the state, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones and steamboats. Similar legislation had preceded

our act in England, in the federal Congress and in many of our sister states. Similar legislation has now been adopted in most of the states. The act of 1891 modified the Code, section 1957 (9), certainly to the extent that the right formerly conferred on railroad companies of fixing the time of running their trains was made subject to the power of the commission to require connections to be made wherever public convenience should require this to be done, and the order was reasonable and just. That act (1891, c. 320) had a repealing clause as to all previous legislation in conflict with it. The present ¹⁴ act of 1899 renewed the general provisions of the railroad commission law, with some extension of its powers and changes, but re-enacting verbatim the provision requiring connections to be made, and giving the corporation commission "general control and supervision of all railroads," with all powers "necessary to carry out the provisions of this act."

In this case the excuse of the defendant for its often missing connection at Selma since 1900 is that train No. 39 was a through train, and that its increase in business made it more difficult to get to Selma in time. It may be natural that the officers of the company, looking to profits, should prefer the through business to the neglect of the convenience of the people of North Carolina, and should be reluctant to avoid the delay caused by heavy through business by putting fifteen dollars per day of its profits into affording the required convenience by an additional train, if necessary. But it is precisely because just and proper regard for public convenience did not always coincide with the largest profit to the corporation that the state had to enact a statute giving to the corporation commission the power to regulate their rates, require suitable connections to be made, and a general supervision of their conduct. An act of the legislature or order of the commission reducing the defendant's charges for freight and passengers many hundreds of thousands of dollars would be valid if it left enough profit, over running expenses, "with economical salaries and management (of which the court will judge) to pay interest on its bona fide debt and some profit to stockholders": *Chicago Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176. It follows that this order, even if it cost the defendant fifteen dollars per day, is in the power of the commission, if it serves public convenience.

The other point as to the constitutional power of the legislature to so enact is also well settled. The general power of the legislature to provide reasonable rules and regulations, ¹⁵ directly or through a commission, has been held by us in *Atlantic Exp. Co. v. Wilmington etc. R. R. Co.*, 111 N. C. 463, 32 Am. St. Rep. 805, 16 S. E. 393, 18 L. R. A. 393; in *Corporation Commission v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. 266, 288, and cases there cited. Among the federal decisions this was asserted in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and has been reiterated in numerous cases since, collected in 9 *Rose's Notes*, pp. 21-55. The doctrine is thus stated in *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 15 Am. St. Rep. 460, 5 L. R. A. 559: "Common carriers exercise a sort of public office and have duties to perform in which the public is interested: *New Jersey S. Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465. Their business is therefore affected with a public interest within the meaning of the doctrine which Lord Hale has so forcibly stated. But we need go no further. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation."

This has been repeated over and over again in all the courts. Citation of authorities would be a work of supererogation. If the public can regulate the charges of a common carrier, so that only it is not deprived of all profits, as is held in *Chicago etc. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176, and *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. ed. 481; it can certainly require a connection for the accommodation of thousands of our people even if, at the utmost, it requires a loss of fifteen dollars a day out of a railroad company making \$2,000,000 net earnings annually out of its operation in this state.

It is not necessary that the particular service required shall be profitable if the total earnings in this state show a profit. It is precisely because some particular service, which the public comfort or convenience may require, is not profitable that the company declines to render it. It prefers to work the soft spots, the best paying ore only, and it is precisely for that reason that the commission is vested with the power to require those things to be done, if reasonable and just (not

necessarily ¹⁶ profitable), as to which there is the protection of an appeal to the superior court and a further review here.

In *St. Louis etc. R. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 39 L. ed. 567, the court, affirming the supreme court of Arkansas in same case (54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452), says that the common carrier cannot "attack as unjust a regulation which fixes a rate at which some part would be unremunerative. . . . To the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated." In *Minneapolis etc. R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151, the court says that if upon the whole operations in hauling coal the road makes a profit, the requirement as to a fair profit upon investment is satisfied, notwithstanding under the order of the commission there would be a loss in hauling at the rate fixed in carload lots. In *Minneapolis etc. R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151, the court say: "We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular." In *People v. St. Louis etc. Ry.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656, the supreme court of Illinois laid down the same doctrine thus: "The sufficiency of the earnings of a railroad to justify the expenses of running a separate passenger train over a certain branch line constituting part of the entire system is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts of the roads operated with the branch as one continual line." In *Railroad & S. S. Co. v. Railroad Commission of La.*, 109 La. 247, 33 South. 214, the supreme court of that state, through Nichols, C. J., in defining the powers possessed by the railroad commission, says: "They extend to matters concerning public comfort and convenience, and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some ¹⁷ particular point enter as important factors in determining what is to be done. The commission cannot ignore the comfort and convenience of numbers of citizens on a line

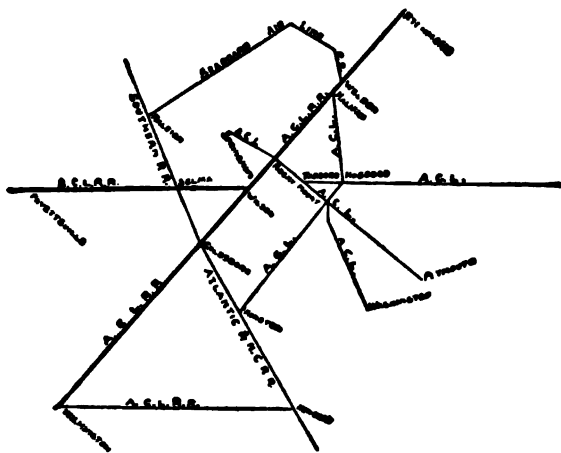
of travel or conveyance to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. . . . In the present issue it cannot be claimed that the Southern Pacific road, either in the operation of its line as a whole or that part of it which falls within the limits of Louisiana, has not been and is not remunerative; nor can it be said that the Morgan Railroad Company is not a paying corporation. . . . We do not think the point is made that after the business of the railroad corporation had made it fairly remunerative, the commission is without general authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly in view."

In *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007, the court says: "It must also be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges (and among such the right to take private property of citizens is not the least), and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders." In *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. Rep. 627, 41 L. ed. 1064, the court says: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction; it may prescribe the location and the plan of construction of the road and the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to ¹⁸ secure the object of its incorporation and the safety, good order, convenience and comfort of its passengers and of the public." In *Wisconsin etc. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed. 194, the court says: "That railroads from the very outset have been regarded as public highways, and the right and duty of the government to regulate, in a reasonable and proper manner, the conduct and business of a railroad corporation have been founded upon that fact. Constituting public highways of a most important character, the functions

of proper regulation by the government spring from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. The companies hold a public franchise and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience."

It is needless to multiply authorities. As the United States supreme court says in the last cited case, the defendant was granted incorporation by the state "to subserve primarily the public good and convenience." If all those things required for the public convenience or comfort were profitable *per se* to the company, a corporation commission would not be necessary to compel the adoption and operation of such betterments. In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. ed. 173, it was held that the legislature may regulate gas and water and other like companies, and requires them to furnish their customers at prices to be fixed by the municipal authorities of the locality, and in *New York etc. R. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. Rep. 437, 38 L. ed. 269, that the legislature could require, even as to railroads already built, the removal of grade crossings at railroad expense. Certainly, then, the police power extends to authorizing the state corporation commission to require two railroad companies to make connection. The corporation commission, after three several investigations, has found that this connection would subserve that ¹⁰ end. The jury, after an overwhelming array of evidence which we have not deemed it necessary to recapitulate or cite, has so found. The statute clearly gives the power, and the authorities are beyond question that the legislature could confer it. Requiring two railroads to make connection is the exercise of a far less power than making rates or compelling the erection of union depots at such junctions.

While we must reverse the decision below and affirm the judgment of the corporation commission, in view of the novelty and importance of this class of litigation, it is well to take notice of some of the exceptions taken by the commission.



It was error to direct a verdict upon the first four issues. Upon the first issue, whether it was practicable to make connection by train No. 39, and the second issue, whether it was practicable to make connection by extending the run of the Plymouth train to Selma, there was a conflict of evidence, and the issues were of fact, and (if material) should have been submitted to the jury. More especially was this true since the order of the commission was presumed to be valid and the burden was on the defendant to show otherwise. ²⁰ *Minneapolis etc. R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151. On the third issue, as to the practicability of running the Springhope train to Selma in the four hours that it lies over at Rocky Mount, the evidence was uncontradicted that this could be done, and there was even evidence from two reputable witnesses which proved (if believed by the jury) that the costs of the extra run would be only ten dollars, showing a profit of fifteen dollars daily. The excuse that the engine was used for shifting at Rocky Mount, or that, being a wood-burner, a small stand for wood would need to be built at Selma—the other engines being coal-burners—did not deserve to be considered against the inconvenience to thousands of the public caused by failure to make this connection. It follows that it was error to instruct the jury in response to the fourth issue to find that the connection could only be made by an additional train from Rocky Mount to Selma.

The first seven issues were irrelevant and immaterial. The motion of the plaintiff for judgment upon the verdict should have been granted. The eighth issue, "Is it reasonable and proper that for the convenience of the traveling public the defendant company should be required to make such connection?" was answered "Yes." This was the only material issue, and upon that finding alone the judgment should be entered here. This view is strengthened by the "inspection of the whole record," which shows that the findings upon the sixth and seventh issues are that if the connection were made by the most expensive of the four methods named, the loss was only fifteen dollars per day, and the report of the defendant to the corporation commission, which is in the record, that its annual net earnings in this state were nearly two millions of dollars. This shows the correctness of the finding upon the eighth issue as to the reasonableness of the order, even in the most adverse view.

The court has the power to enter final judgment here,²¹ and on proper occasions has done so: Code, sec. 957; *Alspaugh v. Winstead*, 79 N. C. 526; *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423; *Cook v. American Exch. Bank*, 130 N. C. 183, 41 S. E. 67. Final judgment has been entered here, not infrequently, by order and without opinion as a matter of course. In *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402, it is said: "If this court reverses or affirms the judgment below, it may in its discretion enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter course is, unless in very exceptional cases, the course pursued, especially since the act of 1887, chapter 192." In *Caldwell v. Wilson*, 121 N. C. 423, 28 S. E. 363, which resembles this case in being a matter of public interest and not a judgment for money, it was held "the judgment must therefore be affirmed, but in view of the public interests involved, we deem it proper not to remand the case but to enter final judgment in this court," which was done—ousting the defendant from the office and seating the relator. Among many other cases in which final judgments were entered here is *White v. Auditor*, 126 N. C. 570, 36 S. E. 132, and similar cases, in none of which the dissents were upon the power of this court to enter final judgment here. The Code, section 957, provides as to this court: "In every case the court may render such sentence, judgment and decree as

on inspection of the whole record it shall appear to them ought in law to be rendered thereon." Rule 49 of this court provides for "a judgment docket of this court," with references to entries as to different causes of action in which recovery is adjudged, and rules 50 and 51 for the issuance of executions from this court on its judgments.

In this matter there has already been a year's delay. The inconvenience to the public continues each day. The act of the legislature for that reason expedites the hearing of these causes by giving them precedence of all other civil cases. Judgment will therefore be entered here reversing the judgment ²² of the superior court, and affirming in all respects and declaring valid the order of the corporation commission made in this case, February 13, 1904. That order simply directed the defendant to make the connection daily at Selma at the time mentioned therein, without specifying whether this should be done by quickening the speed of train No. 39 or by extending the run of the Springhope or the Plymouth train, or by putting on an extra train from Rocky Mount to Selma, and our judgment leaves to the defendant the same liberty of choice as to the mode in which it shall put into effect the order of the commission. Owing to the possible necessity of making preparations to comply with this judgment, there will be a cessat executio till February 10, 1905, entered on the judgment docket of this court, and until that date no mandate shall issue to the defendant upon this judgment.

The judgment of the superior court is reversed.

DOUGLAS, J., Concurring. I fully concur in the opinion of the court; but there is a question omitted therefrom which, though perhaps not essential to the present decision of the court, may become of the greatest importance in view of the federal question raised, or attempted to be raised, by the defendant. I think there was error in excluding, upon the objection of the defendant, answers to the following questions asked by the plaintiff, to wit:

"Q. Mr. Borden, what is the stock of the Atlantic Coast line worth to-day?"

"Q. What was the stock of the Wilmington and Weldon Railroad Company worth twenty years ago?"

"Q. Is not the present value of the original stock of the Wilmington and Weldon Railroad Company, which constituted the basis of the present stock of the Atlantic Coast Line, to-day worth \$1,900 or \$2,000 in the market?"

"Q. What dividends are now being received by the holders of the ²³ original stock of the Wilmington and Weldon Railroad Company?" Record, p. 294.

The questions sufficiently disclose the scope of the proposed inquiry, but would doubtless have been followed by other questions eliciting in greater detail the desired information. In its second exception to the order of the commission, the defendant claims the protection of the constitution of the United States in the following words: "The company, therefore, excepts to the order of the commission in so far as it is construed as requiring it to run an additional train from Rocky Mount to Selma between the hours above named, because to do so would be requiring the company to perform services without compensation to it for the same, and thereby taking its property without due process of law, and in violation of the constitution of this state, and in violation of the constitution of the United States": Record, p. 32. In its brief the defendant also says: "Neither the commission nor the legislature has the power to require the defendant to run an additional train at a loss. The jury finds that to operate this train will impose a daily loss of fifteen dollars upon the defendant, and to compel the defendant to operate this train at a loss would be taking its property without compensation and in violation of the constitution of this state and of the constitution of the United States."

In this view of the case the excluded testimony might become of the utmost importance. We cannot presume that the corporation commission intends "to take the property of the defendant without due process of law" or to require unnecessary services without compensation in some form or another; but we cannot admit that the defendant can ignore the just demands of the public by creating for its own profit and convenience a condition of affairs that makes one train unprofitable by throwing all the remunerative business on trains that do not make connection. The order of the commission does ²⁴ not require the defendant to run an additional train, but simply to make connection. It does not necessarily require any additional, unusual or special services, but simply the performance of its essential duties in such a manner as will meet the reasonable convenience of the public. This the defendant can do by making a through train arrive at Selma a few minutes earlier; but if it prefers to ignore the rights of those living along its line, whose lands it has taken through

the exercise of the right of eminent domain, in order to cater to its through travel, it cannot justly complain if its public duties require the running of an extra train. The mere fact that through passengers from the North to Florida have the choice of three or more routes, varying but little in time and comfort, is no excuse for an unjust discrimination against that part of the traveling public who are dependent upon local lines. This idea was evidently in the mind of this court, when, speaking by Rodman, J., in *Branch v. Wilmington & W. R. R. Co.*, 77 N. C. 347, upon the necessity for the imposition of penalties, it says on page 350: "The legislature considered the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interest of local shippers, for whose interest principally the road was built, and against whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage in order that the company might obtain the carriage from points where there were competing lines by land or water—as from Wilmington to Augusta." The fact that the defendant in that case was the parent of the present defendant may lend additional significance to the words of the court.

In this view the profits of the road, both for the present and the immediate past, would become material. Suppose the witness had answered that no dividend had been paid for years, and that the company was unable to earn anything beyond bare expenses, whereby the stock was almost unmarketable,²⁵ would it not have been competent as tending to prove the defendant's contention that it is unreasonable to demand of it any additional service? On the contrary, suppose the witness had testified as follows: That on one share of the par value of one hundred dollars in the Wilmington and Weldon Railroad Company, the following stock dividends or bonuses had been issued in addition to large annual dividends; that in 1887 the said railroad company had issued upon this one share of stock as a bonus a certificate of indebtedness in the sum of one hundred dollars bearing seven per cent interest; that in 1900 there were issued, in lieu of this one share of stock, two shares of one hundred dollars each of preferred stock in the Atlantic Coast Line Company and two shares of one hundred dollars each of common stock in the Atlantic Coast Line Company; that in 1897 there was also issued to the holder of the one original share of stock four shares of the Atlantic Coast Line Company of Connecti-

cut of one hundred dollars each, and in 1900 a certificate of indebtedness of the Atlantic Coast Line Company of Connecticut for four hundred dollars; that all of said stock and certificates of indebtedness were much above par value and receiving handsome dividends; that recently a dividend of twenty-five per cent had been declared, and that the one original share in the Wilmington and Weldon Railroad Company had thus developed into thirteen shares of stock and certificates of indebtedness of the par value of \$1,300 but of the real value of about \$2,500. Suppose it had been further shown that a little over thirty years ago the state's half interest in the Wilmington and Weldon Railroad Company had been bought for thirty-five dollars a share. Suppose, further, that it was shown that a large part of the alleged indebtedness of the company were certificates of indebtedness issued to the stockholders without any consideration whatever other than the mere capitalization of profits; ²⁶ would not this evidence have been competent to prove that the order of the corporation commission requiring the defendant to quicken its regular train twenty-five minutes in order to make connection at Selma was not unreasonable, and not "taking its property without due process of law and in violation of the constitution of the United States?" Would not such evidence also tend to prove that it would not be unreasonable to require the defendant to make such connection even if it did require an extra train at a loss of fifteen dollars per day, if other trains running on the same line of road and by the same places more than made up the difference?

These are hypothetical answers on both sides. Where the truth may be was peculiarly within the knowledge of the defendant upon whose objection it was excluded. It cannot be contended that such an investigation would be an impertinent inquisition into private affairs, as property taken for a public purpose under the power of eminent domain is indelibly impressed with a public use. This has been too often decided by the supreme court of the United States to be any longer an open question. Two cases will be sufficient for my purpose. In *Chicago etc. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176, the court says, on page 345: "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are

they made up partially of extravagant salaries, fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with ²⁷ the receipts and earnings of the company; for if so advised it might clearly appear that a prudent and honest management would within the rates prescribed secure to the bondholders their interests, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.' "

The corporation commission act (Laws 1899, c. 164), in section 2 provides as follows: "Provided, that in fixing any maximum rates or charges or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this act, the said commission shall take into consideration if proved or may require proof of the fair value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge, or the fair value of the service rendered as in determining the fair value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon, and the present compared with the original cost of construction of all its property within the state of North Carolina; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs."

The case of *Cotting v. Godard*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92, is cited by the defendant, but does not seem to sustain its contentions. In the opinion in that case

appears the following clear distinction between those corporations which, like railroad ²⁸ and telegraph companies, are created for a public purpose, and endowed with certain governmental powers, such as that of eminent domain, and those corporations which are only incidentally devoted to public use, receiving no governmental powers and not impressed with any permanent public purpose. The court says, on page 93: "Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Obviously, there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely a private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself. In the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a large general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing ²⁹ to undertake the work of the state, may it not be urged that he in a measure subjects himself to the same rules of action, and if the body which expresses the judgment of the state believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be com-

pelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public? Again, wherever a purely public use is contemplated the state may, and generally does, bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the state, and exercising those powers and doing the work of the state, is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public have an interest in. In reference to this latter class of cases, which is alone the subject of the present inquiry, it must be noticed that the individual is not doing the work of the state. He is not using his property in the discharge ^{so} of a purely public service. He acquires from the state none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract."

The Principal Case was carried by writ of error to the supreme court of the United States and there affirmed (*Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission* (U. S.), 27 Sup. Ct. Rep. 585), in the following opinion delivered by Mr. Justice White:

"Did the order of the North Carolina corporation commission, the enforcement of which was directed by the court below, invade constitutional rights of the Atlantic Coast Line Railroad Company, hereafter spoken of as the coast line? is the question which arises on this record for decision. A sketch showing the situation of the railway tracks at and relating to the place with which the controversy is concerned was annexed by the court below to its opinion, and that sketch is reproduced to aid in clearness of statement.

operated daily a train from Goldsboro via Raleigh to Greensboro, North Carolina, at which point connection was made with the main track of the Southern road. This Southern train, known as No. 135, left Goldsboro at 2:05 in the afternoon and Selma at 3 o'clock. Thus at Selma it connected with No. 39 of the coast line. The coast line also operated in North Carolina the branch lines shown on the sketch, which radiated easterly, and served a considerable area of territory. These branches connected with the main track at Rocky Mount, a station forty-two miles nearer Richmond than Selma. At Rocky Mount there also was a connection with a coast line road running from Pinner's Point, near Norfolk, Virginia. Over this road also the coast line operated a train, which left Pinner's Point in the morning and connected with the coast line train No. 39 at Rocky Mount. The departure of the train in question from Pinner's Point was so arranged as to enable boats timed to arrive at Norfolk during the night or early morning to make, by ferry to Pinner's Point, a morning connection with the train. On the 3d of October, 1903, the Southern railway notified the North Carolina corporation commission of a contemplated change of schedule on its line from Goldsboro via Raleigh to Greensboro. By the change, which was to go into effect on the 11th of October, Southern train No. 135, instead of leaving Goldsboro at 2:05, would leave at 1:35 in the afternoon, and would leave Selma at 2:25 instead of 3. As a result, the connection at Selma between the coast line train No. 39 and the Southern train would be broken. The North Carolina corporation commission, by letter, on the 6th of October, called the attention of the general manager of the coast line to the contemplated change of time by the Southern, and requested that line to advance the time of No. 39 to enable that train to reach Selma at 2:25, thus continuing the connection with the Southern. On the 12th of October, the superintendent of transportation of the coast line answered. He stated that the schedule of train No. 39 from Richmond to Selma was already so fast that it was very difficult to make the connection at Selma, and that it would be impossible to advance the time of arrival at Selma as requested. It was besides represented that to do so would require a breaking of the connection made with the Norfolk train at Rocky Mount, and would disarrange the running time of the train south of Selma, and disturb connections which that train made with other roads south of that point. However, it was pointed out that as train No. 39 did not originate at Richmond, but was a through train, made up at New York, carried from thence to Washington by the Pennsylvania, and from Washington to Richmond by the Richmond, Fredericksburg and Potomac, that negotiations would be put on foot with those roads with an endeavor to secure an acceleration of the time of the departure of the train from New York and Washington, so as thereby to enable an earlier departure from Richmond. On the 11th of October the change of time became operative and the connection at Selma was broken.

"A complaint having been lodged with the corporation commission because of the inconvenience to the public thereby occasioned, both the Southern and coast line were notified that a hearing would be had concerning the subject on the 29th. On that day the railways, through their officials, appeared. The Southern represented that its change in time was because it was absolutely dangerous to operate its train at the speed required by the previous schedule, and, indeed, that the lengthened schedule was yet faster than desired. The coast line reiterated the impossibility of changing the schedule of train No. 39 from Richmond to Selma unless there was a change between New York and Richmond. It stated that there was to be a meeting in Washington on November 6th of the representatives of various roads in the south, and that it hoped, as the result of that meeting, to so arrange that No. 39 would be scheduled for delivery at Richmond at an earlier hour, thus enabling its time to Selma to be advanced. The commission continued the subject for further consideration. On November 9th the superintendent of the coast line advised the corporation commission that at the meeting in Washington it had been impossible to obtain an earlier departure of the train from New York and Washington, but that the Pennsylvania still had the matter under consideration. Finally, in answer to urgent requests from the commission, by a letter of November 13th, and telegram of November 14th, the coast line informed the corporation commission that it regretted it could make no change in its schedule of train No. 39 because the Pennsylvania railroad had definitely expressed its inability to make any change in the hour of departure of the train from New York, as to do so would be incompatible with the duties which the Pennsylvania railroad owed to the public, to other roads, and to its contracts concerning the transportation of the mail and express matter. Thereupon the corporation commission entered the following order:

"Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily in the afternoon of each day;

"And whereas, it appears that such close connection is practicable:

"It is ordered that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 P. M. each day instead of 2:50 P. M., as the schedule now stands.

"It is further ordered that if the Atlantic Coast Line trains have passengers en route for the Southern railway, and are delayed, notice shall be given to the Southern railway, and that the Southern railway shall wait fifteen minutes for such delayed trains upon receipt of such notice.

"This order shall take effect December 20, 1903."

"The Southern, on receipt of the order, expressed its intention to comply. The coast line addressed to the commission a letter protesting against the order, and requesting its withdrawal, and asking for a further hearing. The letter making this request reviewed the previous correspondence. It pointed out that the connection at Selma had been a very old one and that its breaking was solely caused by the act of the Southern in changing the time of its train. It declared that the coast line at once, on hearing of the intention of the Southern to make the change, urgently requested that road not to do so. On this subject the letter said: 'On October 6th, I further advised the Southern railway that if their train was scheduled to leave Selma at 2:25 P. M. this would break the connection with our No. 39, and stated to them that the connection was a most important one, being the principal outlet for passengers en route from eastern Carolina to Raleigh and other points on their line, and that we hoped that they could see their way clear not to disturb the connection, as it was impossible for us to get No. 39 to Selma at an earlier hour than the present schedule, owing to the inability of northern connections to deliver the train to us at Richmond any sooner.'

"Proceeding to point out the failure of the negotiations with the Pennsylvania, and recapitulating the previous statements concerning the rapidity of the schedule of No. 39 between Richmond and Selma, the exacting nature of its work and connections, the absolute impossibility of making it faster was insisted upon. Indeed, there was annexed to the letter a report of the time of No. 39 at Selma for a period of nearly five months, showing that the train had rarely made its connection at Selma.

"The commission, after a hearing afforded officials of the coast line, suspended its prior order and fixed a day for a rehearing of the whole subject, both roads being notified to that effect. Upon the new hearing the matter was taken under advisement. On January 16th the commission stated the facts and its conclusions deduced therefrom. As to the operation of the two trains, their connection at Selma, the importance of this connection to the public, and the breaking of the connection by the change of schedule, the facts found were identical with those above previously recited. In addition it was found that the coast line train No. 39 from Richmond to Selma was not only a through train, but also operated as a local train between Richmond and Selma, making all local stops, and daily handling, in consequence, one or two extra express cars. It was found in accordance with the official time sheets of the running of the train that it had arrived at Selma on schedule time only twice between August 1, 1903, and January 11, 1904. Considering the branch lines as marked on the sketch, and the trains operated thereon and connecting with the main track at Rocky Mount, it was found:

"a. That a train was operated from Plymouth to Rocky Mount,

which left in the morning at 7:30 and arrived at Rocky Mount at 10:35, where it remained until 3:55 in the afternoon, when it returned to Plymouth.

"b. That the road also operated a train from Spring Hope on the westerly side of the main track to Rocky Mount, leaving Spring Hope at 11:20 in the morning, arriving at Rocky Mount at 12:10 in the afternoon, and leaving there at 4, arriving at Spring Hope at 4:45. The commission concluded as follows:

" 'Assuming that the statements made by the Atlantic Coast Line Railroad Company are true—that it was, for the past five months, impossible for them to bring No. 39 to Selma by schedule time, to wit, 2:50 P. M. more than twice, and that this train was more than ten minutes late every day except twenty-four—we must conclude that it is impracticable to require them to make a faster schedule and place this train at Selma at 2:25 P. M. instead of 2:50 P. M.; and therefore this much of the former order is revoked and annulled; but the commission is of the opinion that it is practicable, and that the convenience of the traveling public requires, that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day; that this can be done by extending the run of the Plymouth train to Selma instead of having it lie over at Rocky Mount as now, or by extending the run of the Spring Hope train to Selma instead of having it lie over at Rocky Mount as now. The distance from Plymouth to Rocky Mount is sixty-nine miles, and from Spring Hope to Rocky Mount is nineteen miles, and from Rocky Mount to Selma forty-two miles; or by providing a separate train for the service.

" 'And it is therefore ordered that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day.

" 'It is further ordered that the Southern railway hold its train No. 135 at Selma fifteen minutes if, for any reason, the Atlantic coast line train connecting at that point is delayed.

" 'It is further ordered that this order take effect on and after the 26th day of January, 1904.'

"Before the date fixed for the taking effect of this order the coast line filed five grounds of exception to its validity and prayed another hearing. The first asserted the impossibility of making the connection from Rocky Mount to Selma between the hours fixed by the commission by an extension of the run of either of the branch trains referred to in the order which the commission had rendered. The reasons principally relied upon to sustain the first exception were the inadequate character of the motive power of the branch road trains for operation on the main track, the speed at which the train would be obliged to travel, and the congested condition of the business on the main track during the hours when the train from

either of the branch roads would be obliged to use the main track for the purpose of making the connection. The second exception denied the possibility of making the connection by a special train from Rocky Mount to Selma within the time indicated, and besides asserted that such a train could not be operated without an actual loss. The power of the commission to compel the performance of 'services without compensation to the company' was denied, and it was alleged that a taking of property without due process of law, in violation of the state constitution and the fourteenth amendment to the constitution of the United States would result from enforcing the order. The third exception denied the power of the commission, under the state law, to order the company to put on an extra train between Rocky Mount and Selma, and the fourth in effect reiterated the same ground. The fifth exception challenged the validity of the order as unreasonable, unjust, and arbitrary, and beyond the power of the commission to render, because ample and sufficient accommodations for passengers desiring to connect at Selma with the Southern road were afforded by the coast line, entirely irrespective of the connection which had formerly existed between train No. 39 of the coast line and train No. 135 of the Southern. The trains thus relied upon as showing a wholly adequate service for the purposes stated were eight in number, and, as enumerated in the exception, are stated in the footnotes.*

*"1. The train from Rocky Mount, southbound in the early morning, makes a close connection at Goldsboro at 6:50 o'clock with the Southern for Raleigh and all points west.

"2. The trains from Norfolk and Richmond make close connection at Goldsboro and Selma with the night train on the Southern for Raleigh and all points west.

"3. The train from Weldon to Kinston makes close connection at Kinston with the Atlantic and North Carolina train for Goldsboro, which train in turn makes close connection with the Southern at Goldsboro at 9:40 P. M. for Raleigh and all points west.

"4. The train No. 39, from Washington, to Jacksonville, is due at Selma at 2:50 P. M., and the accommodation train No. 183, on the Southern, from Selma to Raleigh and all points west, is scheduled to leave Selma at 3:25 P. M.

"5. Train No. —, from Jacksonville to Washington, is due to arrive at Selma at 2:10 o'clock, and makes close connection there with the Southern, which leaves Selma at 2:25 P. M. for Raleigh and all points west.

"6. Two trains leave Wilmington for the north, the first at 9:30 A. M., No. 48, and the other, No. 42, at 6:50 P. M. Both of these trains make close connections at Goldsboro with the Southern trains for Raleigh and all points west.

"7. No. 34, leaving Smithfield at 7:00 A. M., makes close connection at Selma with the Southern going west for Raleigh and all points beyond, and the same train makes close connection at Weldon with the Seaboard train for Raleigh, and for Seaboard points south and west.

"8. No. 102 leaves Goldsboro for Norfolk at 7:30 A. M., and makes close connection at Hobgood with No. 58, the train from Kinston to Weldon, and there with the Seaboard for Raleigh and points west."

"After a new hearing, at which further testimony was taken, the corporation commission in substance adhered to its former view and reiterated its previous ruling. In its findings of fact it pointed out the importance of the connection at Selma, the admissions to that effect made by the railroad and the fact that that connection afforded the principal means of travel between the eastern and western parts of the state. The grounds relied upon in the exception to show that an extension of the run of either of the local trains from Rocky Mount to Selma, as previously ordered, was impracticable, were reviewed and found to be without foundation. The trains which it was alleged afforded adequate means for connection between the western and eastern part of the state, irrespective of the connection formerly existing at Selma by train No. 39, were analyzed, and as a matter of fact the service afforded by these trains was held to be wholly inadequate. Thus, for example, whilst it was found that the first train relied upon—the one from Rocky Mount to Goldsboro, arriving there at 6:50 in the morning—made a connection with a Southern railway train moving from Selma via Raleigh to Greensboro, it was pointed out that it was inadequate because the train had no connection at its point of departure, Rocky Mount, with any incoming train over the large area covered by the branch roads, which area, it was stated, embraced a population of four hundred thousand people. Hence it was found that, to use that train, any person in the territory covered by the branch roads would be obliged to leave home the day before and pass the night at Rocky Mount. The fourth train relied upon, that is, a connection made by coast line No. 39 at Selma under the new schedule with a later train over the Southern road for Raleigh, was found to be but a connection with a Southern freight train, having no passenger-car, but only a caboosse. The trains under the second, third, and sixth headings connecting at Goldsboro or Selma in the afternoon and night, were found to make a connection only with a slow train over the Southern road, doing a mixed passenger and freight business, and which made no adequate connection beyond Raleigh to the west. The objection to suggested route No. 8, that is, via Weldon, and thence by the Seaboard Air Line to Raleigh and points further west, was decided to be that it was a longer route, more costly, and uncertain as to connections. The remaining suggested routes were in effect disposed of upon similar considerations to those above adverted to.

"Considering the operation of an extra train from Rocky Mount to Selma or the extension of the run of one of the branch trains as directed in the previous order, and the objection that a loss would be entailed in the operating expenses for such train or trains, the commission treated that fact as immaterial, because it found as a matter of fact that the total receipts of the coast line in North Carolina, taken from business in that state, were sufficiently remunerative,

and therefore that even if the train was operated at a loss, as that loss would not reduce the total earnings below what was an adequate remuneration for the whole business, the order would not take the property of the road without due process of law. Summing up its conclusions, the commission said:

“ ‘The commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line Company to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk and Carolina branch, the Plymouth branch, and the Nashville branch with No. 135, Southern railway passenger train at Selma, and also for all points between Rocky Mount and Selma for nearly ten years, should be restored; that if this cannot be done by the Atlantic coast line train No. 39, as formerly, on account of this train being heavier, containing usually one or more extra express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from eastern Carolina to Selma and other Southern railway points for the last ten years, instead of being abandoned should be made permanent and certain; and that this result be accomplished by carrying out the order heretofore made in this court. It is ordered, therefore, that the exceptions be, and they are hereby, overruled.’ ”

“ ‘The coast line, as authorized by statute, appealed to the superior court of Wake county, city of Raleigh, and the case was there tried *de novo* before a court and jury. The jury, under the instructions of the court, considered and responded to the eight questions, which follow:

“ ‘1. Is it practicable for train No. 39 of the Atlantic coast line railroad, due to arrive at Selma at 2:50 P. M., to make connection at Selma with train No. 135, westbound, of the Southern railway, due to leave Selma at 2:25 P. M.? Answer. No.

“ ‘2. Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return, and, if so, what would be the additional expense? Answer. No.

“ ‘3. Is it practicable to make said connection by the use of the Spring Hope train, and, if so, what would be the additional expense? Answer. No.

“ ‘4. In order to make such connection would defendant company have to run an additional train on its main line from Rocky Mount to Selma? Answer. Yes.

“ ‘5. Is it practicable for said train to safely run the schedule scribed in plaintiff's order, having due regard to the number of trains and number of stops, on defendant's main line from Rocky Mount to Selma? Answer. Yes.

“ ‘6. What would be the daily cost of operating such train from Rocky Mount to Selma and return? Answer. Forty dollars.

"7. What would be the probable daily receipts from such train? Answer. Twenty-five dollars.

"8. Is it reasonable and proper that, for convenience of the traveling public, the defendant company should be required to make such connection? Answer. Yes.'

"The answers to the first four questions were the result of peremptory instructions by the court, and the responses to the last four were deduced by the jury from the testimony submitted to its consideration.

"The court granted the prayer of the Atlantic coast line to that effect, and rendered judgment on the verdict in its favor. The corporation commission was held to be without power 'to interfere with the right of railway companies to regulate for themselves the time and manner in which passengers and property should be transported,' provided only such companies complied with the existing statutory direction 'to run one passenger train at least each way over its line every week day.' On appeal the supreme court of North Carolina reversed the judgment. The facts found by the corporation commission were reiterated and it was held that error had been committed by the court below in instructing the jury to give a negative response to the first three propositions. Indeed, it was declared that the only essential proposition submitted to the jury was the eighth, which required it to be determined whether the connection at Selma was necessary for the public convenience. Treating the facts found by the commission as sustaining the conclusion reached by that body, it was decided that the commission had power to make the order, and that the exercise of the authority was not repugnant either to the constitution of the United States or of the state. Notwithstanding the finding of facts made concerning the means by which the connection at Selma was to be performed, the court construed the order of the commission as not having been solely based upon the means of performance referred to in the findings, and as embracing not only a choice of the methods referred to therein, but any other which the coast line might choose to adopt, provided only it accomplished the purpose of the order. But whilst thus, from one point of view, treating the order of the commission so as to render it unnecessary to pass upon the particular methods for making the connection at Selma referred to in the findings, the court yet reviewed the means of performance therein stated. In doing so it was decided that although to execute the order of the commission it might be imperative for the coast line to operate at a pecuniary loss a new train from Rocky Mount to Selma, or the extension, with like result, of the movement of one or the other of the branch trains from Rocky Mount to Selma, no violation of any right of the coast line protected by the constitution of the United States or of the state would arise. This was based upon the finding by the court that the average net earning of the railroad from its

business in North Carolina was of such a character that an adequate remuneration would remain after allowing for any possible loss which might arise from operating either of the trains in question: 137 N. C. 14, 49 S. E. 191.

"All the assignments of error challenge the correctness of the decision below on the ground of its repugnancy to the due process or equal protection clauses of the fourteenth amendment. The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine: *Chicago B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cutts*), 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. Rep. 832, 27 L. ed. 812; *Illinois C. R. Co. v. Illinois*, 108 U. S. 541, 2 Sup. Ct. Rep. 839, 27 L. ed. 818; *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, 29 L. ed. 636; *Stone v. Illinois C. R. Co.*, 116 U. S. 347, 6 Sup. Ct. Rep. 348, 29 L. ed. 650; *Stone v. New Orleans & N. E. R. Co.*, 116 U. S. 352, 6 Sup. Ct. Rep. 349, 29 L. ed. 651; *Dow v. Beidelman*, 125 U. S. 680, 1 Inter. Com. Rep. 56, 8 Sup. Ct. Rep. 1928, 31 L. ed. 841; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. Rep. 255, 35 L. ed. 1051; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. Rep. 705, 40 L. ed. 838; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. Rep. 714, 40 L. ed. 849; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed. 194; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151; *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. Rep. 396, 48 L. ed. 614; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 605, 26 Sup. Ct. Rep. 341, 50 L. ed. 596; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 27 Sup. Ct. Rep. 108; *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 27 Sup. Ct. Rep. 109. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in character as to transcend the limits of regulation, and to be a denial of due process of law, or a deprivation of the equal protection of the laws.

"As the public power to regulate railways and the private ownership of such property coexist and do not the one, on the other, it has been settled that the right of ownership of

property, like other property rights, finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the fourteenth amendment: *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, 29 L. ed. 636; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 3 Inter. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 33 L. ed. 970; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. Rep. 400, 36 L. ed. 176; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 399, 4 Inter. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, 38 L. ed. 1014; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 39 L. ed. 567; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 L. ed. 979; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. Rep. 336, 44 L. ed. 417; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596. The result, therefore, is that the proposition relied upon is well founded if it be that the order which the court below enforced was of the arbitrary and unreasonable character asserted.

"In coming to consider the question just stated, it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation, and to be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws. We shall not, in analyzing the case, undertake to review in their order the ten propositions of error found in the record and reproduced in the briefs of counsel, as each proposition, although numbered separately, but reiterates grounds of error to be found in the others. In other words, the various grounds of error are so interblended in the several propositions as to render it impossible to treat one as distinct from the other. All the grounds, however, which the propositions assert as establishing the arbitrary and unreasonable character of the order complained of may be embraced under four general headings, which we proceed to dispose of.

"1. *That the order was arbitrary and unreasonable, because beyond the scope of the authority delegated to the corporation commission by the state law.*

"As this proposition involves no federal questions, and is concluded by the judgment entered below, we put the subject out of view. And, although not cognate to the proposition, to clear the way for the com-

sideration of the substantial issues, we also put aside the suggestion made in argument, that, as the Southern railway, by its change of schedule, originally rendered the connection at Selma impossible, therefore that road should have been compelled to restore the connection by a modification of the schedule or schedules of the trains by it operated. We put this suggestion aside because it does not seem to have been seriously urged in the court below, and besides is so directly refuted by the findings that we think it requires no further notice.

"2. The order was arbitrary and unreasonable, because, when properly considered, it imposed upon the coast line a duty foreign to its obligation to furnish adequate facilities for those traveling upon its road.

"This rests upon the assumption that, as the order was based not upon the neglect of the coast line to afford facilities for travel over its own road, but because of the failure to furnish facilities to those traveling on the coast line who desired also to connect with and travel on the Southern road, therefore the order was in no just sense a regulation of the business of the coast line. This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate, and yet virtually denies the efficiency of that authority. That power, as we have seen, takes its origin from the quasi public nature of the business in which the carrier is engaged, and embraces that business in its entirety; which, of course, includes the duty to require carriers to make reasonable connections with other roads, so as to promote the convenience of the traveling public. In considering the facts found below as to the connection in question—that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection—we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations.

"3. That the facilities afforded the public by the railroad were of such a character as to demonstrate that the extra burden which would result from the compliance with the order was wholly arbitrary and unreasonable.

"That rests upon the assumption that as there were several existing daily connections between trains of the coast line and those of the Southern at Selma, which might be availed of by those desiring to travel from eastern to western North Carolina and beyond, and as, besides, the proof established that another connection operating the same result was afforded by way of Weldon and the Seaboard Air Line to Raleigh and thence farther west, therefore it was both arbitrary and unreasonable to superadd an unnecessary connection. Conceding, as

must be done, that the nature and extent of the existing facilities furnished by a carrier for the public convenience are essential to be considered in determining whether an order directing an increase of such facilities is just and reasonable, and that the deficiency of facilities must clearly appear, to justify an order directing the furnishing of new and additional facilities, we think the proposition here relied on to be without merit. Its error arises from assuming that adequate facilities were afforded at Selma or via Weldon and the Seaboard without reference to the order complained of. In view of the facts as to the connections at Selma and the Weldon route, found by the commission and reiterated by the court, which we have previously stated, and which we accept, we cannot escape drawing for ourselves the conclusion deduced both by the commission and the court below that the connections relied on were wholly inadequate for the public convenience, and, therefore, a state of things existed justifying the order.

"4. That, however otherwise just and reasonable the order may have been, it is inherently unjust and unreasonable because of the nature of the burden which it necessarily imposes.

*"This proposition is based on the hypothesis that the order, by necessary intendment, directed the coast line to operate an additional train, although such train could not be operated without a daily pecuniary loss. The premise upon which this proposition rests would seem to be irrelevant, since the court below, in one aspect of its opinion, treated the order of the commission as not requiring the operation of an extra train from Rocky Mount to Selma. Yet, as the facts found by the commission and which were affirmed by the court would indicate that it was considered that the operation of such train was the most direct and efficient means for making the ordered connection, and as the court considered and passed upon the duty of the railroad to comply with the order, even if to do so it became necessary to operate the extra train at a loss, we think the proposition relied upon is open and must be decided. The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order, and demonstrates that to give it effect would constitute a taking of property without due process of law, in violation of the fourteenth amendment. Conclusive support for this contention, it is insisted, is afforded by the doctrine upheld in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819, and the cases which preceded that decision. The cases relied upon, however, only involved whether a general scheme of maximum rates imposed by state authority prevented the railroads from earning a reasonable compensation, taking into view all proper considerations as to the value of the property and the cost of operation, and, if so, whether the enforcement of rates so unreasonably low would be unjust and unreasonable, and, therefore, be confiscation—that is, a taking of property without due process of law, in violation of the constitution of the United States. The principle upon which the cases*

in question proceeded was thus summed up by Mr. Justice Harlan, delivering the opinion of the court in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819: 'A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States.'

"But this case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitability of the operation of the railroad as an entirety. The difference between the two cases is illustrated in *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 39 L. ed. 567, and *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. Rep. 900, 46 L. ed. 1151. But even if the rule applicable to an entire rate scheme were to be here applied, as the findings made below as to the net earnings constrain us to conclude that adequate remuneration would result from the general operation of the rates in force, even allowing for any loss occasioned by the running of the extra train in question, it follows that the order would not be unreasonable, even if tested by the doctrine announced in *Smyth v. Ames* and kindred cases.

"It is insisted that, although the case be not controlled by the doctrine of *Smyth v. Ames*, nevertheless the arbitrary and unreasonable character of the order results from the fact that to execute it would require the operation of a train at a loss, even if the result of the loss so occasioned would not have the effect of reducing the aggregate net earnings below a reasonable profit. The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously or the performance of first one service and then another and still another, at a loss, which could be continued in favor of selected interests until the point was reached where, by compliance

with the last of such multiplied orders, the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand. Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification, and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the fourteenth amendment. Let it also be conceded that a like repugnancy to the constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve, for a wholly inadequate compensation, a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although, by doing so, as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable, under the doctrine of *Smyth v. Ames*, or under the concessions made in the two propositions we have stated. Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criterion to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance. A similar contention to the one we are considering was adversely passed upon in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed. 194. That case involved the enforcement

of an order of a state railroad commission directing a railroad company to acquire the necessary land and make a track connection for the purpose of affording facilities for the interchange of business with another road. The court, after holding that the order was not so unjust and unreasonable as to be repugnant to the constitution of the United States, disposed of the contention that the order was void because compliance with it would necessitate the incurring of expense, by saying (179 U. S. 302, 21 Sup. Ct. Rep. 120, 45 L. ed. 201): 'Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error: Worcester v. Norwich & W. R. Co., 109 Mass. 103; People v. Dutchess & C. R. Co., 58 N. Y. 152; People v. Boston & A. R. Co., 70 N. Y. 569; People v. New York, L. E. & W. R. Co., 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.'

"Affirmed."

BYNUM v. WICKER.

[141 N. C. 95, 53 S. E. 478.]

TENANCY BY ENTIRETIES—Conveyance by Husband Alone.—Although a husband may, by deed in which his wife does not join, convey an estate by entireties, and thus entitle the grantee to hold during the grantor's life, such deed does not give the grantee a right to cut timber on the land conveyed. (p. 676.)

TENANCY BY ENTIRETIES—Conveyance by Husband Alone—Estoppel.—If a husband, by deed in which his wife does not join, conveys an estate held by them by entireties, both he and she are estopped during their joint lives from interfering with the possession of the land thus granted and conveyed. (p. 676.)

U. L. Spence, for the plaintiff.

Seawell & McIver, for the defendant.

⁹⁵ CLARK, C. J. Edward Fields and wife were tenants by entirety of the tract in question. Edward Fields, without the joinder of his wife, mortgaged the land to John R. Lane. The land was sold under the power of sale in the mortgage and the plaintiff holds by mesne conveyance from the purchaser at such sale. This is a proceeding for an injunction ⁹⁶ against the defendants, who are the agents of Edward Fields and his wife, to prevent their cutting the timber on said land.

This estate by entirety is an anomaly, and it is perhaps an oversight that the legislature has not changed it into a co-tenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law: *Long v. Barnes*, 87 N. C. 329; *West v. Aberdeen etc. R. R.*, 140 N. C. 620, 53 S. E. 477. At common law "the fruits accruing during their joint lives would belong to the husband" (*Simonton v. Cornelius*, 98 N. C. 433, 4 S. E. 38), hence the husband could mortgage or convey it during the term of their joint lives; that is, the right to receive the rents and profits; but neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired. "He cannot alien or encumber it, if it be a freehold estate, so as to prevent the wife or her heirs, after his death, from enjoying it, discharged from his debts and engagements": 2 Kent's Commentaries, 133; *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790.

It is clear, therefore, that the timber being a part of the freehold, the plaintiff would have no right to cut the timber, claiming under a conveyance from the husband alone. The husband having conveyed his interest is estopped from interfering with the possession of the premises during the joint lives of himself and wife, and of course so is the wife. Whether, if he should be survivor, his deed is valid as a conveyance of his interest by survivorship is a point as to which the authorities are conflicting, but we are not now called upon to decide that point, as it is not before us.

In refusing an injunction to the hearing there was error.

Tenancies by the Entirety are discussed in the note to *Hardenberg v. Hardenberg*, 18 Am. Dec. 377. By the common law such a tenancy is created when the grantees in a deed are husband and wife, unless a contrary intent is manifest. This rule, however, has been abrogated in many states: See *Wilson v. Frost*, 186 Mo. 311, 105 Am. St. Rep. 619; *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339; *Boland v. McKowen*, 189 Mass. 563, 109 Am. St. Rep. 663. The husband has the right to use an estate by entireties during coverture, but he cannot alienate it: *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430. Therefore the wife has no right to a share of the crops growing on the land: *Morrill v. Morrill*, 138 Mich. 112, 110 Am. St. Rep. 306; and his transfer of personalty held by entireties vests in the transferee an estate for the life of the husband, but cannot deprive the wife of her right of survivorship: *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430.

BLACKWELL v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

[141 N. C. 117, 53 S. E. 833.]

INSURANCE—Foreign Insurance Companies—Assets.—Assessments to become due a foreign life insurance company from policy-holders residing within the state are not, when due, debts or choses in action which such company can enforce therein. (p. 678.)

RECEIVERS—Foreign Insurance Companies—Assets.—A receiver will not be appointed for a foreign insurance company when it has no assets or property within the state, other than assessments to become due against its policy holders therein. (pp. 679, 680.)

INSURANCE—Receivers.—If a contract of insurance expressly provides that a certain percentage of the assessments thereon shall be set apart for the purpose therein set forth, the court cannot, through a receiver, compel the payment of an assessment to be appropriated to the payment of plaintiff's claim in violation of the terms of the contract and the rights of policy-holders. (p. 680.)

INSURANCE—Foreign Companies—Void Contracts of Insurance.—A provision in an insurance policy that "this contract shall be governed by, subject to, and construed only according to the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York," is void so far as its enforcement in the courts of another is concerned. (p. 680.)

Guthrie & Guthrie, for the plaintiff.

Winston & Bryant and Hinsdale & Son, for the defendant.

¹¹⁷ CONNOR, J. Plaintiff sued to recover amount of premiums paid defendant company, two thousand three hundred and fourteen dollars, on account of assessments upon a policy of twenty-five thousand dollars, which he alleges was wrongfully and in violation of terms of the contract canceled by defendant. He remitted the excess over two thousand dollars. After setting forth the facts upon which his alleged cause of action is based, he alleges ¹¹⁸ that defendant having, in compliance with the laws of this state, appointed an agent upon whom services of process could be served, fraudulently and for the purpose of preventing suits being brought in the courts of the state, attempted to cancel its power of attorney. That plaintiff's policy was issued while said power of attorney was in force and while defendant was engaged in soliciting business and issuing policies in this state. That defendant has now in force a large number of policies issued to citizens and residents of this state and that it is collecting assessments or premiums on said policies. That

for the purpose and with intent to defraud its North Carolina policy-holders, defendant is taking from the state and the jurisdiction of the courts its assets and property. That the insurance commissioner of this state has prepared and published a statement showing that the affairs of defendant company are badly managed, that judgments against it for large amounts are unpaid and outstanding. That from said publication and other sources set out in his affidavits plaintiff believes that defendant company is insolvent or in imminent danger of insolvency. For the reasons and upon the grounds thus set forth plaintiff asks that a receiver be appointed by the court to take into his possession a sufficient amount of the property and assets of defendant in this state to satisfy and discharge his claim, etc. An order was duly issued directing defendant to show cause before the judge presiding in the ninth judicial district why a receiver should not be appointed as prayed, etc.

The defendant company on the return of said order filed an answer, and affidavits in support thereof, denying the material allegations contained in plaintiff's complaint and affidavits. Defendant also denied that it owned any property or assets in this state, and averred that no person residing in this state was indebted to it. That the payment of the assessments made upon policy-holders was voluntary, and that by the express terms of the policy, a copy of which is set out, ¹¹⁹ the holder assumes no personal liability for the payment of said assessments. That by the terms of said policy failure to pay the assessment works a forfeiture thereof, but imposes no other liability upon or against the holder. That said assessments are due and payable at the home office of defendant company in New York. It denies that it is insolvent or in imminent danger of becoming so, setting forth a statement of its assets and liabilities. It avers that it canceled the power of attorney to its agent without any other purpose than to cease doing business in the state and without any intent or purpose to defraud its creditors or policy-holders. His honor, upon hearing the answer and affidavits, declined to appoint a receiver. Plaintiff appealed.

In view of the admitted facts in regard to the property rights, or rather absence of such rights, within the jurisdiction of the courts of this state, we are relieved from the necessity of discussing the affidavits in regard to the management and solvency of the defendant company. Assuming that, upon the

facts stated in the complaint, in the light of the decisions of this court in which the same defendant was a party, plaintiff has a valid cause of action, and assuming that defendant is in danger of becoming insolvent, we find ourselves confronted with the difficulty in granting the motion for a receiver by the fact that the company has no assets within this state which could be taken into possession of such receiver. The only rights suggested by plaintiff in this connection are assessments to become due hereafter from policy-holders residing in this state. These assessments will not be, when due, debts or choses in action which the defendant could enforce. "The levying of an assessment does not make a member a ¹²⁰ debtor to the association, authorizing it to bring suit in the event of his neglect or refusal to pay; the only effect of the default is to relieve the association of its obligation to the member": Cooley on Insurance Briefs, 1013; New York Ins. Co. v. Stathan, 93 U. S. 24, 23 L. ed. 789; 2 May on Insurance, 3d ed., 341. The law, supported by authority, is thus stated in Bacon on Benefit Societies, section 357: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor. The payment of the premium or assessment is only a condition precedent of the liability of the company; the insured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not as he pleases; he has the perfect right to do either, and need give no excuse for his choice. If he does not pay, the contract is ended." While the court would be prompt to protect by any process within its power the rights of a citizen against a foreign corporation and hold any property within its jurisdiction to meet the demand when established by judgment, it will not do a vain thing and send its officer to chase unsubstantial possibilities. The only effect of the appointment of a receiver in this case would be to embarrass and probably injure other policy-holders, without any resultant benefit to plaintiff. If the receiver demanded payment of an assessment and it was refused, he could not enforce its payment—he having no other right against the policy-holder than the defendant company has. If he should seek to enjoin payment to the company, he would be met with the obstacle that if the courts of this state enjoined such payment, the policy would be avoided for

nonpayment of assessment. If so declared avoided by the company, this court would have no power to protect the policy-holder by mandamus or otherwise. Without pursuing the discussion further, it is manifest that no possible benefit could accrue to the plaintiff, and ¹²¹ much annoyance and injury to innocent persons. "The liability of the members of the mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company and vested with their rights and powers and nothing more": Ald. on Rec., sec. 372. The power of receiver to enforce assessments made upon unpaid stock is based upon the fact that the delinquent stockholder owes a debt to the company for which it could maintain an action; whereas for an assessment upon an insurance policy, as we have seen, no action could be maintained by the company. Again, it seems to be established by the authorities cited in the well-considered brief of defendant's counsel that such assessments as are levied under the provisions of the policies issued by defendant company are when paid impressed with a trust for the benefit of the other policy-holders. The contract of insurance expressly provides that a certain percentage of the assessments shall be set apart for the purposes set forth therein. We could not, through a receiver, compel the payment of an assessment to be appropriated to plaintiff's claim in violation of the terms of the contract and the rights of other policy-holders. The plaintiff has no lien or specific claim to any portion of the assets of the company. This plaintiff, together with thousands of others, has entered into a contract of insurance with a corporation having no capital or assets within reach of the courts of his state, and with but little, if any, substantial guaranties of compliance with its contract. By a very remarkable provision, which if read should have put plaintiff upon notice, the contract declares that, "This contract shall be governed by, subject to and construed only according to the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York," is void so far as the courts ¹²² of this state are concerned: Rev., sec. 4806. It seems from his account of the dealings between the company and himself that he has expended a considerable amount of good money with a poor prospect of realizing any

very substantial returns. The courts of this state in the trial of his cause will adjudge his rights, but it seems that, as others have been compelled to do, he must pursue his remedy to reach assets of the defendant in the courts of New York. We do not entertain any doubt of the power of the courts of this state, either by attachment or, in proper cases, the appointment of a receiver, to seize and retain any property of a foreign corporation in this state and apply it to the payment of debts due our citizens. The exercise of this power does not involve winding up the affairs of the corporation. It is only for the purpose of securing the fruits of the recovery. The question is fully discussed by Mr. Justice Walker in *Holshouser v. Gold Hill Copper Co.*, 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183. We have examined the case of *Mutual R. F. L. Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. Rep. 707, 47 L. ed. 987, cited by plaintiff. The only question decided upon that appeal related to service of process and procedure. It is true that the court of Kentucky appointed a receiver after judgment in an action against this defendant. Whether there was property other than assessments to become due does not appear.

For the reasons set out, his honor's judgment must be affirmed.

The Question of When it is Proper to Appoint a Receiver for a corporation is discussed at length in the notes to Cameron v. Groveland Improvement Co., 72 Am. St. Rep. 29; *Cortelyou v. Hathaway*, 64 Am. Dec. 482.

DOBBINS v. DOBBINS.

[141 N. C. 210, 53 N. E. 870.]

WITNESSES—Credibility of Question for Jury.—If there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always an open question for the jury, and this is so though the testimony may be all one side and all tend one way, and in this event the judge may charge the jury if they find the facts to be as testified by the witnesses, to answer the issue in a certain way, but not, upon the evidence, so to answer it, as by such charge he passes upon the credibility of the witnesses. (pp. 683, 684.)

COTENANCY—Adverse Possession.—Tenants in common hold their estates by several and distinct titles, but by unity of possession, and an entry by one inures to the benefit of all, not only as concerns themselves, but also as to strangers. (p. 685.)

COTENANCY—Ouster—Adverse Possession.—There may be an entry or possession of one cotenant amounting to an actual ouster so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and the putting him out of the seisin, and such an actual ouster followed by possession for the requisite time will bar the cotenant's entry. (p. 685.)

COTENANCY.—Ouster is a disseisin by one cotenant of his cotenant, the taking of possession by one and holding it against the other by an act or series of acts which indicate a decisive intent and purpose to occupy the premises exclusively and in denial of the rights of all others. (p. 686.)

COTENANCY—Ouster—Adverse Possession.—An exclusive, quiet, and peaceable possession by a tenant in common and those under whom he claims for more than twenty years raises a legal presumption of an actual ouster of the other cotenant's possession, not at the end of the period, but at its beginning, and that the subsequent possession was adverse to the cotenants who were out of possession, which defeats their right to partition or to bring an action in ejectment. (pp. 688, 689.)

COTENANCY—Ouster—Adverse Possession.—Disability of a Cotenant during the period of more than twenty years, when the possession is quietly and exclusively held by his cotenant, and those under whom he claims, cannot be permitted to rebut the presumption of law as to an ouster of the former, when the possession commenced in the lifetime of their ancestor from whom they claim, and who was at the time under no disability. (p. 689.)

Armfield & Turner and J. B. Armfield, for the plaintiffs.

Furches, Coble & Nicholson, for the defendants.

211 WALKER, J. Proceeding for partition of land, which was transferred from the clerk, upon the issue of sole seisin raised by the pleadings. The land, which consisted of two

tracts, the "Home" and "Holman" tracts, was originally owned by Milas Dobbins, who died in 1863, leaving two sons, Alfred and Augustus Dobbins. Alfred died September 25, 1878, leaving three children by his first marriage, George, Fannie and John, and two by his second marriage, David (one of the plaintiffs), born January 22, 1875, and Una May, born April 12, 1878, and married to R. E. Stafford April 9, 1901. She died in August, 1905, leaving a child, R. E. Stafford, Jr., then three or four years old, who is the other plaintiff. Augustus Dobbins, the other son of Milas Dobbins, took possession of the land when his father died, and has remained in possession until his death in 1901, when his widow, the defendant, Sarah Dobbins, continued in possession of the Home tract to the bringing of this suit, and of the Holman tract until September 3, 1903, her husband having devised all of the land to her by his will, which was duly admitted to probate and introduced in evidence. On September 3, 1903, she conveyed the Holman tract to the defendant, George B. Nicholson, trustee, for the use and benefit of the other defendants, B. F. Long, D. M. Furches and A. L. Coble. The trustee took possession on that day and has held it ever since. The court admitted the evidence of the probate of a paper writing purporting to be the will of Milas Dobbins, the appointment of the administrator with the will annexed and his qualification. ²¹² The will was not put in evidence, nor did the nature of its contents in any way appear. Plaintiff objected to this testimony.

At the conclusion of the testimony "the court instructed the jury that, upon the evidence, the plaintiffs were not entitled to recover and they should answer the issue 'no.' " Plaintiffs excepted. There was a verdict and judgment accordingly and plaintiffs appealed.

When the plaintiffs had rested, there was no evidence of any possession of the lands by the defendants. The only testimony in regard to it came from the defendants' witnesses, and the court could not properly give a peremptory instruction to find for the defendants, when the burden of proof had shifted to them by the plaintiff's proof of title in Milas Dobbins and the descent from him to the plaintiffs and his other heirs mentioned in the case. When there is a disputed fact depending for its proof upon the testimony of witnesses, the

credibility of the witnesses is always an open question for the jury, and this is so, though the testimony may be all on one side and all tend one way. In the latter case, the judge may charge the jury if they find the facts to be as testified by the witnesses to answer the issue in a certain way but not, upon the evidence, so to answer it, as by such a charge he passes upon the credibility of the witnesses. We disapproved a similar instruction at this term in *Smith v. Cashie etc. Lumber Co.*, 140 N. C. 375, 53 N. E. 233, 5 L. R. A., N. S., 439, and such an instruction has been condemned in many previous decisions besides being expressly forbidden by statute. "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province ²¹³ of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon": Code, sec. 413; Revisal, sec. 535. We should be compelled to order a new trial for this error, if it did not clearly appear that the exception to this instruction was not based upon this ground, but was intended to raise the question whether the bare possession of the defendants (nothing else being proved) was in law sufficient to bar the plaintiff's right of entry, and to put the case upon its real merits. There is no reference made in the brief of the plaintiffs' counsel to any error in the charge other than the one relating to the character of the defendants' possession and its legal sufficiency to defeat the plaintiffs' recovery. In this case, the error in the form of the instruction was not perhaps very material, and seems to have been so regarded by the plaintiffs' counsel, as there was no serious controversy as to the facts, and a new trial on that ground would be of little or no avail. Before leaving this part of the case, we will remark that the case on appeal was not prepared or revised by the presiding judge, who is always careful and painstaking, and we infer that the charge as given was in proper form and that it was worded by counsel, as it is now, inadvertently, the purpose being to present the real question involved without paying much, if any, heed to matters of form. We will therefore consider the case, as counsel have done in their briefs, as presenting the single question whether the defendants' proof was sufficient in itself to toll the plaintiffs' entry and defeat their action.

This question has been before this court so often that it ought not now to be difficult of solution. We undertook at the last term, as our predecessors had frequently done before, to state the principle of law by which such cases are governed. Some misunderstanding has arisen by failing to distinguish between the doctrine of adverse possession as applied to the relation of tenants in common, and as applied in ²¹⁴ ordinary cases, where there is no such relation, and consequently no privity or fealty as between the parties. The distinction between an actual and a presumed ouster has, perhaps, not been sufficiently taken into account. We will endeavor again to "run and mark the line," and to restate the principle of adverse possession as applicable to tenants in common. Such tenants hold their estates by several and distinct titles, but by unity of possession, because none of them can know his own severalty, or, as Littleton puts it, no one of them can tell which part is his own and, for this reason, they occupy promiscuously, the only unity being that of possession: 2 Blk. 192. An entry or possession by one of the tenants inures to the benefit of his cotenants, not only as concerns themselves, but also as to strangers: *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580; *Carothers v. Dunning's Lessee*, 3 Serg. & R. 373. There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and to putting him out of the seisin. It is needless to do more than to state the simple proposition that such an actual ouster followed by possession for the requisite time will bar the cotenant's entry. But the law goes further, and the rule has been well settled for many years in this state, as it had been before in England, that when one tenant in common has been in undisturbed possession and use of the land for twenty years, in an ejectment brought against him by his cotenant, the jury will be directed to presume an actual ouster when the possession was first taken and consequently to find a verdict for the defendant. Ouster, or dispossession, says Blackstone, is a wrong or injury that carries with it the assertion of possession, for thereby the wrongdoer gets into actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession of ²¹⁵ the freehold and dam-

ages for the injury sustained. It is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement. The first two consist in a wrongful entry when the possession is vacant—an ouster of a freehold in law. The third, disseisin, is a wrongful putting out of him that is seised of the freehold—an attack upon him who is in the actual possession and turning him out—an ouster from a freehold in deed. The fourth, discontinuance, occurs when the feoffee of tenant in tail holds beyond the life of the feoffor, under a feoffment for a greater estate than the latter can convey, his possession thus retained being considered as an injury to the heir in tail, whose ancient legal estate is thereby destroyed, or at least suspended or for a while discontinued. The fifth and last, deforcement, signifies the holding of any lands or tenements to which another person hath a right, and includes all the others and any other species of wrong whatsoever, whereby he who has a right to the freehold is kept out of possession, but is contradistinguished from them in that it is only a detainer of the freehold from him who has the right of property, but never had any possession under that right: 3 Blackstone's Commentaries, 167 et seq. A species of deforcement is when the ancestor dies seised of an estate in fee simple, which descends to two of his heirs as parceners, and one of them enters before the other, and will not suffer the coparcener to enter and enjoy her moiety: 3 Blk. 174; Fitzherbert Nat. Brev. 197. We have thus reviewed this subject to show the nature of an ouster, and in order that we may understand clearly what it is the law means when it is said to presume an ouster. It is a disseisin by one tenant of his cotenant, the taking by one of the possession and holding it against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the exclusion and in denial of the right of the other. This is what the law presumes, whether it be in ²¹⁶ exact accordance with the real facts or not. It is a presumption the law raises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this court, and is a most reasonable inference of the law and justified under the circumstances, first, because men do not ordinarily sleep on their rights for so long a period, and, sec-

ond, because a strong presumption arises that actual proof of the original ouster has become lost by lapse of time. The period of time requisite to raise the presumption which anciently was required to be of much greater length than now, has by this court been fixed at twenty years in analogy to the statute of limitations barring titles. The rule which has long obtained with us was well stated by Nash, J., for the court, in *Black v. Lindsay*, 44 N. C. 467: "The possession of one tenant in common is in law the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. Possession, then, for twenty years under the above circumstances will amount to a disseisin or ouster of the cotenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession—as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession." There was no more proof in that case than in the one now before us. But in *Thomas v. Garvan*, 15 N. C. 223, 25 Am. Dec. 708, the facts were practically identical with those we have here, and the same ²¹⁷ rule was applied. Judge Gaston, for the court, saying: "The sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this not because it clearly proves the acquisition of such right, but because from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had. Where the law prescribes no specific bar from length of time, twenty years have been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor. We think the judge who tried this cause was correct in charging the jury that the twenty-one years' exclusive possession of the defendant, and her de-

ceased husband, since the petitioner became discovert, did raise the legal presumption of an ouster," and barred the plaintiff's recovery. This was followed by *Cloud v. Webb*, 15 N. C. 290, 25 Am. Dec. 711, which clearly shows the nature and extent of the presumption: "The possession of one tenant in common is in law the possession of all the tenants in common. One may, however, disseise or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred, unless it has been continued for that length of time, which furnishes a legal presumption of the facts necessary to uphold an exclusive possession." This case was in turn followed by *Linker v. Benson*, 67 N. C. 150; *Covington v. Stewart*, 77 N. C. 148; *Neely v. Neely*, 79 N. C. 478; *Caldwell v. Neely*, 81 N. C. 114; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. W. 625; *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 291; *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104. The same doctrine was applied in *Fisher v. Prosser*, 1 Cowp. 217, decided by the king's bench in which Lord Mansfield presided as chief justice. It was said by Justice Aston in that case: "Now in this case, there has been a sole and quiet possession for forty years, by one tenant in common only, without any demand or claim for an account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near forty years is not?" And by Justice Willes: "This case must be determined upon its own circumstances. The possession is a possession of sixteen years above the twenty years prescribed by the statute of limitations, without any claim, demand or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession."

The proof in this case showed an exclusive, quiet and peaceable possession by the defendants and those under whom they claim for more than twenty years, indeed for more than forty years, and the law presumes that there was an actual ouster, not at the end of that period, but at the beginning, and that

the subsequent possession was adverse to the cotenants who were out of possession. This converted the estate in common, as between the former cotenants, into one in severalty, in the defendants, and defeated plaintiffs' right to partition or to an ejectment.

The disability of some of the parties, during the period when the possession was held by the defendants and those under whom they claim, cannot be permitted to rebut the presumption of the law as to the ouster, for the possession commenced in the lifetime of their ancestor, from whom they claim and who was at the time under no disability: *Seawell v. Bunch*, 51 N. C. 195. That was a case in which a deed was presumed to have been made after twenty years' possession. Pearson, C. J., said: "Presumptions of the kind we are considering ²¹⁹ are made on the ground of public policy, in order to discourage litigation of stale demands and to quiet the possession of estates, and this policy would be in a great degree obstructed, if, after the presumption had commenced to arise, it was allowed to be stopped by some intervening circumstance other than an assertion of the right. Where the one party is exposed to an action at the commencement, and the other neglects to pursue his remedy, a subsequent disability cannot be allowed to prevent the principle from being carried out, for otherwise in a large proportion of cases, it would fail to take effect, and the policy of the law would be defeated. Our conclusion, both from analogy and from the 'reason of the thing,' is, that when the presumption has commenced, it is not stopped by a subsequent disability." The two cases are analogous: See, also, Justice Ashhurst's opinion in *Fisher v. Prosser*, 1 Cowp. 219, 220. The ruling in *Seawell v. Bunch* is sustained by many cases, but we will only cite a few of them: *Mebane v. Patrick*, 46 N. C. 23; *Pearce v. House*, 4 N. C. 722; *Chancey v. Powell*, 103 N. C. 159, 9 S. E. 298; *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298; *Andrews v. Mulford*, 2 N. C. 311; *Anonymous*, 2 N. C. 416; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315. The rule as to the effect of twenty years' possession was adopted in analogy to the statute of limitations, and when that statute begins to run against the ancestor, it is not suspended by any disability of the heirs at the time of descent: *Wood on Limitations*, 11; *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298.

The view we have taken of the case makes it unnecessary to consider the question presented by counsel in their argument as to what is ordinarily necessary to render a possession sufficiently adverse to bar a right if continued for the requisite time, and as to whether any change in this respect has been wrought by the Code, section 146, Revisal, 386. Too many cases have been decided by the court since that section was enacted as law, in which the rule we have stated as to a ²²⁰ presumed ouster has been recognized and applied, for us to hold at this time that the rule has been changed by it, at least where the conviction or ouster took place prior to 1868: *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766. In that case the ouster was in the same year as in this case, 1863: See, also, *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345, and *Ruffin v. Overby*, 88 N. C. 369. What is the true construction of section 146 of the Code (now Revisal, 386) with reference to causes of action founded upon an ouster, which occurred since the date of its adoption, is left open for future consideration, when the matter is directly presented.

The court correctly charged the jury as to the effect of the facts proved in this case upon the plaintiffs' right to recover.

No error.

Adverse Possession of the common property by one cotenant against the others is considered in the recent note to *Joyce v. Dyer*, 109 Am. St. Rep. 609.

BURNETT v. LYMAN.

[141 N. C. 500, 54 S. E. 412.]

EJECTMENT—Transfers Pendente Lite.—If, after the institution of an action in ejectment, the plaintiff conveys the land by deed in fee simple, and the grantee is not made a party, to the suit, the defendant is, upon his motion, entitled to a judgment of nonsuit. (p. 692.)

EJECTMENT—Real Parties in Interest.—The rule that in an action of ejectment the plaintiff must have the right to the possession not only at the time of the institution of the suit, but at the time of trial also, is not altered by a statute providing that the action shall not abate by death or transfer of interest, as this statute must be construed in connection with another statute providing that every action must be prosecuted in the name of the real party in interest, and that when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. (p. 692.)

EJECTMENT—Transfers Pendente Lite.—In an action of ejectment the grantee of the land pendente lite may not only be substituted as party plaintiff, but if the original plaintiffs remain in the case, such grantee having become a party in interest, he is necessary to a complete determination of the action, and it is the duty of the court to have him brought in and made a party. (p. 692.)

F. Carter, for the plaintiffs.

Tucker & Murphy, for the defendants.

501 CLARK, C. J. This is an action of ejectment begun by W. B. Burnett and W. E. Burnett. After it had been pending for some time the plaintiffs conveyed the land by deed in fee simple to one Rawls, who before the trial conveyed to Mattie C. Moore, a married woman. Neither Rawls nor Mrs. Moore were made parties. Upon the above facts appearing in evidence, the defendants moved for judgment of nonsuit. The court refused the motion and directed the jury, if they believed the evidence, to find the issues in favor of the plaintiffs.

In *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278, Burwell, J., says: "In an action to recover land, the rule is that the plaintiff must have the right to the possession not only at the institution of the suit, but at the time of trial also," quoting 7 *Lawson R. & R.*, section 3708, which lays this down as the universal rule, save, he says, one case in Vermont, which Judge Burwell further shows was not in truth any exception. *Arrington v. Arrington*, is cited to sustain this

proposition: *Morehead v. Hall*, 132 N. C. 122, 43 S. E. 542. To same effect is 15 Cyc. 29, and cases there cited.

The defendants admit that this proposition was unquestionably true under the former practice, but contend that this is changed by Revisal, section 415, which provides that: "No action shall abate by the death, marriage or other disability of a party, or by a transfer of any interest therein, if the cause of action survive or continue. . . . In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." Aside from the fact that this section, enacted in 1868, was in ⁵⁰² force when the above-cited cases were decided, it must be noted that the general principle of the reformed procedure is that "Every action must be prosecuted in the name of the real party in interest" (Revisal, 400), and that the above-quoted section 415 does not refer to the parties who may maintain an action, but to "abatement of actions," and must be construed in connection with section 400, and with the following provision in section 414: "When a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." Certainly a complete determination cannot be had when the true owner of the land is not a party to the action.

Construing sections 400, 414 and 415 of the Revisal together and recalling that the last relates to the "abatement of actions" only, it would seem that the provision therein that the action may be continued in the name of the original plaintiff means simply that the abatement does not act automatically upon the transfer of the interest, and that if the action is continued without objection, the judgment shall not be void, but, none the less, the judge should cause those in interest (section 400) to be "brought in" (section 414), and upon objection made, as in *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278, and in this case, it was error not to require them to be made parties; else sections 400 and 414 would be useless. The bargainee of the land pendente lite may not only be substituted as party plaintiff (*Talbert v. Becton*, 111 N. C. 543, 16 S. E. 322), but if the original plaintiffs remain in the case, such bargainee, having become the "party in interest" (section 400), is necessary to a complete

determination of the action, and it is the duty of the judge, certainly if objection is made, to have him "brought in" (section 414). In *Davis v. Higgins*, 91 N. C. 382, relied on by the defendants, there was no objection for failure to make the bargainee a party, but the court held that if the assignment had been brought to the attention of the court, it should *ex mero motu* have dismissed ⁵⁰³ the action, unless a prosecution bond had been filed by the bargainee.

That section 415 does not have the effect of permitting the original plaintiff in ejectment to recover, after conveying his interest, without either joining his grantee as a party or substituting him as a party, is clear from the language of section 415 that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein." Certainly upon the death of a party, though the action does not abate, judgment cannot be had without making his personal representative a party. So when there is a conveyance by the plaintiff, his bargainee must either be "brought in" (section 414) as an additional party or "substituted"—being necessary to the determination of the action—because he is now the party in interest. (Sec. 400.)

If this were not so, the judgment would solemnly record an untruth, "that the plaintiff is the owner and entitled to the possession" of the property. There might be cases where the defendant could urge an equity against the grantee, and from this he should not be cut off. Also, the defendant has the right to have the bargainee "brought in" that he may be liable for the costs, if unsuccessful. The action "does not abate" by death or transfer, but in both cases other parties must be made, and in case of a transfer, though the action may be continued in the name of the original party, the true party in interest, the bargainee, must be "brought in" if objection is made.

It was error in the court to instruct the jury that "if they believed the evidence to find that the plaintiffs were the owners and entitled to the possession." If they believed the evidence, the jury were compelled to find just the opposite. and that the plaintiffs were not the owners, and were not entitled to possession, because it was shown that they had parted with all the rights they had possessed.

Error.

If, Pending an Action in Ejectment against several defendants holding distinct parcels of property, the plaintiff sells to one of them, such vendee may continue the suit as plaintiff against the other defendants. But it must be the same suit, and for the property claimed by the first plaintiff, and not for that and other property claimed by the last plaintiff, and united by an amended complaint to that originally sued for: *Bullion Min. Co. v. Croesus Gold etc. Min. Co.*, 2 Nev. 168, 90 Am. Dec. 526.

To Sustain Ejectment, the Plaintiff must, except as against a mere trespasser, have title at the commencement of the action. A title subsequently accruing will not authorize a recovery: *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 711. But a recovery by the plaintiff in ejectment may be defeated by the defendant showing title in himself acquired after the commencement of the action: *McCauley v. Jones*, 34 Mont. 375, ante, p. 538.

WINKLER v. KILLIAN.

[141 N. C. 575, 54 N. E. 540.]

PARENT AND CHILD—Services Rendered by Adult Child—Compensation.—If an adult child removes from the home of his parent, marries, and afterward renders personal services to his parent which are voluntarily accepted, a promise on the part of the parent to pay therefor will be implied. (pp. 697, 698.)

PARENT AND CHILD—Services by Adult Child—Compensation.—In the absence of fraud or gross neglect, an adult child's claim for personal services rendered his parent after arriving at majority should be reduced by the amount actually received by such child in the use and management of the parent's property, and not by what he should have received by more diligent management. (p. 699.)

E. B. Cline and S. J. Ervin, for the plaintiff.

Avery & Avery and M. H. Yount, for the defendant.

576 HOKE, J. There was allegation and also evidence on the part of plaintiff tending to show that Susan Winkler, late a resident of the county of Burke, died intestate in said county about the twenty-sixth day of March, 1903, and that on the sixth day of August, 1903, defendant was duly qualified as her administrator.

2. That the defendant's intestate was the widow of Abram Winkler, who died in the county of Burke about twelve or thirteen years ago, leaving at his death said widow, then living at the home place, and three sons and four daughters living at the time, all of whom had married and moved away many years before the death of either parent.

3. That after the death of said Abram Winkler it became necessary for the defendant's intestate to have a constant attendant both day and night, as she was an exceedingly large and fleshy woman of advanced age, afflicted with dropsy and other diseases, and it was necessary for some one to provide her sufficient supply of food each day, and to see that it was suitably prepared.

4. That from about the 20th of June, 1892, to the twenty-sixth day of March, 1903, the plaintiff had the sole responsibility and entire expense of taking care of her and giving her food, fuel, etc., and provided her all proper attention and service by his own labor, that of his wife, his three minor sons and help employed by him, both day and night, and with properly prepared food furnished three times and upward from his own house; that this labor and the amount of food so consumed was at all times much greater than would be required for an ordinary person, but especially during the last five or six years of the life of the defendant's intestate, while she was childish and greatly afflicted with ⁵⁷⁷ dropsy, she was a constant care to the plaintiff, requiring persons to attend to and work with her almost constantly, day and night, and he was compelled to keep large fires going constantly, both day and night, both winter and summer, consuming an immense quantity of wood, said service, care and attention, and amounts paid physicians, burial expenses, etc., being of the value of four thousand five hundred and fifteen dollars and fifteen cents.

5. That in order to be better able to render the services hereinbefore mentioned, the plaintiff moved from the place he was living at the time of his father's death to a point nearer his mother, but did not at any time reside in the house with her nor she with him; that he at one time started a new house for her, with her approval, close to his own for greater convenience, and got up the frame, but she changed her mind, not wishing to leave the old home, and he tore down the frame and erected another house nearer to her for the occupancy of Mrs. Wood and her children, who for about six years was the constant attendant of the defendant intestate under employment by the plaintiff.

6. That during all the years aforesaid none of the other sons or daughters of the defendant's intestate ever contributed anything to her support, nor did any of them ever come to see her except one daughter on a few occasions.

Plaintiff in his own behalf testified as follows: "I am plaintiff in this action. Have been married about thirty years. I built a house on my father's land and moved to myself three or four months after I was married. I have lived by myself ever since. I afterward bought the land on which I built. I moved to the place I now live a few months after my father's death."

Plaintiff then proposed to prove by his own testimony that "soon after the death of his father, in 1891, the children met together, and that the plaintiff told the others that if they or any of them would take the old lady and take care of her ⁵⁷⁸ he would give them all his interest in her estate; but that if he took care of her he should expect to be well paid. That the others declined to take care of her." At the close of the evidence the court said to counsel that he would charge the jury that upon the testimony, if believed, the plaintiff could not recover at all and in deference to this intimation of the court, plaintiff excepted, submitted to a nonsuit and appealed.

It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as well as any other gift, if the work is done and accepted without expectation of pay. It is equally well established that when a child resides with a parent as a member of the family or with one who stands to the child in loco parentis, services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous, and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay can be reasonably inferred. This last position is usually considered as an exception to the general rule, and in this and most other jurisdictions obtains both as to adult and minor children. Wherever the same has been applied, however, to claims by adult children so far as we can discover, it has been made to depend not alone on the fact of kinship in blood, but also on the fact that the adult child ⁵⁷⁹ has continued to reside with the parent as a mem-

ber of the family. This additional fact of membership in the same family has been present in all the cases on this subject that we have noted in this state, from the case of *Williams v. Barnes*, 14 N. C. 348, down to that of *Stallings v. Ellis*, 136 N. C. 69, and frequently finds expression in these decisions as the controlling fact on which they rest.

Thus in *Williams v. Barnes*, 14 N. C. 348, Ruffin, J., delivering the opinion of the court, said: "It cannot be possible that the head of a harmonious household must drive each member off as he shall arrive at age or be bound to pay him wages or for occasional services unless he shows that it was agreed that he should not pay." In *Dodson v. McAdams*, 96 N. C. 149, 60 Am. Rep. 408, 2 S. E. 453, Merrimon, J., for the court, said: "It seems to be settled law, certainly in this state, that if a grandfather receives a grandchild or grandchildren into his family, and treats them as members thereof—as his own children—he and they are in loco parentis et liberorum, and hence, if the grandchild in such case shall do labor for his grandfather, as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises; the presumption is to the contrary. The grandchild, as to his labor or services rendered in such case, is on the same footing as a son or daughter. And this is so after the grandchild attains his majority, if the same family relation continues. This rule is founded in large measure upon the supposition that the father clothes, feeds, educates and supports the child, and that the latter labors and does appropriate service for the father and his family in return for such fatherly care and domestic comfort and advantage. The family relation and the nature of the service rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it."

⁵⁶⁰ In *Young v. Herman*, 97 N. C. 280, 1 S. E. 792, it is held: 1. "When a child after arrival at full age continues to reside with and serve the parent, the presumption is that the service is gratuitous; 2. But this presumption may be rebutted by proof of facts and circumstances which show that such was not the intention of the parties, and raise a prom-

ise by the parent to pay as much as the labor of the child is reasonably worth." Again, in *Callahan v. Wood*, 118 N. C. 752, 24 S. E. 542, Faircloth, C. J., for the court, said: "We do not put our decision entirely on the kinship relation, but also on the one family relation established and maintained by the parties." In *Hicks v. Barnes*, 132 N. C. 146, 43 S. E. 604, the fact that the parties lived as members of the same family was brought out and dwelt upon as the controlling feature of the case. The one family relationship is so clearly made the ratio decidendi in claims of this character that the principle extends to many other cases of kinship besides that of parent and child, including persons who are no blood kin, but stand in this relation to each other, and applies also where the parent resides with his child as a member of the child's family and household. This was held in *Stallings v. Ellis*, 136 N. C. 69, 48 S. E. 548, and the facts stated and the entire opinion show that the decision was made to depend on the relationship between the parties as members of one and the same household and family.

Counsel have not cited, nor have we been able to find, any case in this state where an adult child making a claim for services had removed from the home and family of the parent, had married and assumed the care and responsibility of a family of his own for and during the time the services were rendered. Courts of the highest authority in other jurisdictions, however, have dealt with the matter and have held that in such cases the general rule obtains that where such services are rendered and voluntarily accepted, a promise to pay therefor will be implied. Thus in *Parker's Heirs v. ⁵⁸¹ Parker's Admr.*, 33 Ala. 459, it is held that "whatever may be the claims of filial duty and affection as between an aged and infirm father and his grown son, there is no principle of law which requires the son, living separate and apart from the father, to perform services for the latter without compensation, where the father is in comfortable circumstances; consequently, to support the son's claim for compensation for such services, proof of an express contract is not necessary." And in *Steel v. Steel*, 12 Pa. 64, *Rodgers, J.*, for the court, said: "Had this been a claim for services rendered without request by a son while residing in the same house with the father and as a member of his family, this action could not be maintained. But, if we believe the evidence,

the services were performed at the request of the father by a son who lived at a distance from him on a different property, and with a family of his own to support": See, also, *Bell v. Moon*, 79 Va. 341; *Smith v. Birdsall*, 106 Ill. App. 264; *Markey v. Brewster*, 10 Hun, 16; same case approved 70 N. Y. 607. There are other decisions of like import and they fully sustain the doctrine as stated generally in 21 American and English Encyclopedia of Law, second edition, 1061: "The general rule deduced from the authorities is that where a child, after arriving at majority, continues to reside as a member of the family with the parent or with one who stands in the relation of a parent, or where a parent resides in the family of a child, the presumption is that no payment is expected for services rendered or support furnished by one to the other. This presumption is not conclusive, but may be overcome by proof." And further on page 1063: "Where a child lives separate and apart from a parent, has left the father, married and set up life for himself, the presumption that the service or support is gratuitous does not obtain." The text-writers are to same effect: *Abbott's Trial Evidence*, 2d ed., 443; Page on Contracts, secs. 778-782. On the evidence admitted by the court the plaintiff was entitled to the charge that if the ⁵⁸² same was believed the law would imply a promise on the part of the intestate to pay what the services were reasonably worth, the amount to be determined by a jury or referee, as the court in its legal discretion may determine. In taking the account or determining the amount by a jury, the plaintiff's claim for personal service should be reduced by the amount received by him in the use and management of the intestate's property. In the absence of fraud or gross neglect, the plaintiff would be only chargeable for what he actually received from this source, and not what he could have received by more diligent and careful management. There is error and a new trial is awarded.

Where a Child Works for His Parents after becoming of age, it has been held that the law implies no contract on the part of the latter to pay for the services: *Poorman v. Kilgore*, 26 Pa. 365, 67 Am. Dec. 425. See, further, *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125; *Dodson v. McAdams*, 96 N. C. 149, 60 Am. Rep. 408; note to *Vance v. Calhoun*, 113 Am. St. Rep. 121.

STATE v. WHEELER.

[141 N. C. 773, 53 S. E. 358.]

CONSTITUTIONAL LAW—Working Roads—Double Taxation. A statute providing for the working on public highways or roads by labor is not unconstitutional as double taxation. (p. 701.)

CONSTITUTIONAL LAW—Double Taxation.—No constitutional prohibition exists against double taxation. (p. 701.)

CONSTITUTIONAL LAW—Taxation.—The fourteenth amendment to the constitution of the United States does not require equality in levying taxation by a state; that matter is governed entirely by the provisions of the state constitution. (p. 702.)

HIGHWAYS, Work on—Poll Tax.—A statutory requirement that male citizens shall work on the public roads is not a poll or capitation tax. (p. 702.)

TAXATION.—Time is not Money nor is labor property in the sense that they can be liable for a property tax. (p. 702.)

HIGHWAYS, Work on—Taxation.—Conscription of labor to work the public roads is not a tax, but the exaction of a public duty. (p. 703.)

R. D. Gilmer, attorney general, and H. E. Norris, for the state.

R. H. Battle and S. G. Ryan, for the defendant.

774 CLARK, C. J. The defendant appeals from a conviction and sentence for failing to work the public roads of Wake county, as required by chapter 667 of the laws of 1905, amendatory of chapter 551 of the laws of 1903. The appeal rests upon the alleged unconstitutionality of the statute. The defendant contends:

1. Time is money. Labor is a man's property and therefore to exact his labor and time to work the roads is to levy a tax on property and such is unconstitutional unless *ad valorem*.

2. That if working the road is a poll tax, the act is unconstitutional because it exacts this labor only of "able-bodied male persons between the ages of twenty-one and forty-five," and excepts "residents in incorporated cities and towns and such as are by law exempted or excused," whereas the poll tax (Const., art. 5, sec. 1) is to be laid on "every male inhabitant between the ages of twenty-one and fifty."

3. That the requirement to work the roads is not placed upon those living in incorporated towns and cities, and there-

fore there is a denial of the equal protection of the laws required by the fourteenth amendment to the constitution of the United States.

4. That inasmuch as the roads are now worked partly by taxation, supplemented by labor exacted by the statute, and the latter is a property tax (a man's labor being his property), therefore this is double taxation.

These points have been repeatedly passed upon adversely to the contentions of the defendant: *State v. Sharp*, 125 N. C. 628, 74 Am. St. Rep. 663, 34 S. E. 264, which has been cited and approved in *State v. Covington*, 125 N. C. 641, 34 S. E. 272; *State v. Carter*, 129 N. C. 560, 40 S. E. 11; *Brooks v. Tripp*, 135 N. C. 159, 47 S. E. 401; *State v. Holloman*, 139 N. C. 642, 52 S. E. 408. But counsel ask us to reconsider them, and we have given the matter full deliberation.

For near two hundred and fifty years the roads of this state were worked solely by the conscription of labor. It may have been inequitable, but it was never thought by anyone to be unconstitutional, nor has the idea been advanced heretofore that to work the roads by labor was to work them by taxation. The validity of working the roads by labor is sustained in *State v. Halifax*, 15 N. C. 345, and has been recognized in countless trials for failure to work the roads. Under this statute, Wake county works its roads partly by labor supplemented by funds raised by taxation and other funds and the work of its convicts. If the exaction of the labor of residents of the locality is, as counsel contend, a tax upon property, then we simply have a higher tax, but not double taxation. The tax does not seem to be more than enough to keep the roads in good order, but if it should so prove, the people themselves, acting through their elected representatives in the General Assembly, and the board of county commissioners, will reduce it. The tendency of the times is to require better roads, which necessarily demands higher taxes for road purposes, which is more than offset, it is claimed, by the benefits derived from better roads. But that is a matter of legislation and administration. The courts cannot meddle with it. Nor is there any constitutional prohibition against double taxation: *Commissioners v. Blackwell Durham Tobacco Co.*, 116 N. C. 441, 21 S. E. 423; *Cooley's Constitutional Limitations*, 7th ed., 738, and cases there cited. It exists in many instances that will readily occur to anyone, as the taxation of mortgages and indebtedness

in the hands of a creditor, and taxation at the same time of mortgaged property, and of the real and personal property of a debtor, without reduction by reason of the mortgage or other indebtedness; the taxation of the tangible property of a corporation and also of its capital stock and of its franchises and also of the certificates of ⁷⁷⁶ shares in the hands of the shareholders: *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. Rep. 1014, 29 L. ed. 240; *Commissioners v. Blackwell Durham Tobacco Co.*, 116 N. C. 441, 21 S. E. 423. There are many other instances, but this is a matter of legislation. Certainly this is not double taxation any more than taxing the dweller in town to keep up his streets (all of which falls upon him), and also laying a tax on his property to aid in working the roads.

Nor does the fourteenth amendment require equality in levying taxation by the state, if this exaction of labor be taxation. How a state shall levy its taxation is a matter solely for its legislature, subject to such restrictions as the state constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of federal supervision. Besides, as the dwellers in the towns keep up their streets at a greater expense than the value of the statutory labor put on the roads, there is no discrimination of which the defendant can complain, especially as the tax money expended on the roads to supplement the statutory labor is levied on town property as well as upon that in the country.

The requirement to work the roads is not a poll or capitation tax, which is a sum of money required to be paid by "every male inhabitant over twenty-one and under fifty years of age," which "shall be applied to the purposes of education and the support of the poor": Const., art. 5, secs. 1, 2. Certainly "four days' work on the public roads" in one's own township are not capable of being applied to education, or the poor or anything else except to the roads.

This brings us to the first ground urged. To say that "time is money" is a metaphor. It expresses merely the fact that time is of value, and that the use of a man's muscle, or of his skill, or of his mentality will usually procure money in exchange. But time is not money, nor is labor property, in any other sense than that it is usually of some value and ⁷⁷⁷ its proceeds belong to the individual or to the parent or

guardian if he is a minor, or to the state, if he is a convict. But it is not property in the sense that it can be liable to a property tax.

As already pointed out in *State v. Sharp*, 125 N. C. 628, 74 Am. St. Rep. 663, 34 S. E. 264, the conscription of labor to work the public roads is not a tax at all (*Cooley's Constitutional Limitations*, 737; *Pleasant v. Kost*, 29 Ill. 490); but the exaction of a public duty like service upon a jury, grand jury, coroner's inquest, special venire, as a witness, military service and the like, which men are required to render either wholly without compensation, or (usually) with inadequate pay, as the sovereign may require: *Guilford v. Commissioners*, 120 N. C. 23, 27 S. E. 94; *State v. Hicks*, 124 N. C. 829, 32 S. E. 927. Originally none of these received any pay whatever (*State v. Massey*, 104 N. C. 877, 10 S. E. 608), the duration of military service only having a time limit. And to this day witnesses, above two to each material fact, receive no pay (*Revisal*, sec. 1300), and witnesses for the losing party receive none unless he is solvent, and talesmen summoned upon a special venire, unless chosen on the trial panel, receive (except in a few counties) no pay; which was true till recently of witnesses summoned before the grand jury in all cases where "not a true bill" is returned; and witnesses for the state in criminal cases where the convicted are insolvent receive only half pay. Even when a witness or a juror receives a prescribed per diem, in most cases it is less, in many cases far less, than what his time was worth or he could have earned. If the state can take his services for less than their value, it is because it has a right to require them as a public duty, and hence it can, as of old, require them to be rendered without any compensation at all. Who will say that ten dollars per month is compensation for the time of a citizen sent to the front in time of war, or to put down riots, and for the hardships, and the exposure to weather, to disease, to danger and to death? If the state can exact such services it can exact labor to ⁷⁷⁸ improve its public roads for the public benefit. The worker on the roads gets back some benefits therefrom. It was a crude and not very accurate calculation or balancing of benefits, but was a necessity perhaps in former times when currency was scarce and difficult to be obtained even by taxation. It is still a matter resting in the legislative discretion. Justices of the

peace and some other officials formerly discharged the public duties required of them without compensation.

In the progress of time we have gradually commenced payment, to a limited extent, for most public services exacted as a public duty. Justices of the peace receive fees. Some witnesses and jurors are paid, usually less than the value of their time, but many witnesses, and special veniremen usually still go unpaid, and compulsory military service is paid only what the legislature sees fit. The public duty of the residents of any locality to work upon its roads has been reduced in Wake county by this statute to four days per annum, and such service is supplemented by the work of the force of county convicts, by a tax of twelve and one-half cents upon the one hundred dollars' worth of property in the cities as well as in the country to hire labor and purchase labor-saving machinery, by the appropriation of four-tenths of the net proceeds of the dispensary in Raleigh, and further by a special tax which any township shall see fit to vote for the benefit of the roads therein, and the four days' labor required can be commuted by the payment of two dollars and fifty cents with which the county will hire labor instead.

This is a very great advance upon the still recent custom, which has been in force for more than two centuries, of working the roads entirely and solely by labor called out in the discharge of the public duty of the inhabitants of each locality to keep the highways in order. Whenever in the judgment of the people of Wake county the four days' labor, per annum, still exacted should be reduced, or entirely abolished, ⁷⁷⁹ they can send representatives to the General Assembly who can doubtless procure such changes as the people may wish in the manner of working the public roads. As we said at last term, in *State v. Holloman*, 139 N. C. 642, 52 S. E. 408: "It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of those methods—and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent legislatures."

And there, after the fullest consideration, we again leave the matter. If the system of working the public roads in any locality is not satisfactory to the majority of its people,

relief or change of method must be sought from the law-making department.

No error.

Brown and Walker, JJ., concur in result.

The Constitutionality of Statutes requiring persons to work on the public roads is considered in the note to *State v. Sharp*, 74 Am. St. Rep. 667.

STATE v. LILLISTON.

[141 N. C. 857, 54 S. E. 427.]

HOMICIDE—Reckless Shooting.—If two men engage in shooting at each other in a crowded waiting-room, and a bystander is killed, both are guilty of murder, one as principal and the other as aiding and abetting. (p. 706.)

HOMICIDE—Reckless Act.—Malice is implied when an act, dangerous to others, is done so recklessly and wantonly as to evince depravity of mind and disregard for human life, and if the death of any person is caused by such an act, it is murder. (p. 706.)

TRIAL—Instructions.—An excerpt from a charge to the jury must be construed with the context and in connection with the whole charge. (p. 707.)

HOMICIDE—Sudden Assault—Self-defense.—If a person on trial for murder sets up the defense that he was suddenly assaulted it is not error to charge the jury that "self-defense exists where one is suddenly assaulted, and in defense of his person, where an immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills his assailant." (p. 708.)

NEW TRIAL—Criminal Cases.—A motion for a new trial in a criminal case on the ground of newly discovered evidence will not be granted, especially where the evidence is merely cumulative or where it has been withheld by the moving party. (p. 710.)

R. D. Gilmer, attorney general, for the state.

Argo & Shafter and J. N. Holding, for the defendant.

⁸⁵⁸ CLARK, C. J. It was in evidence that the prisoner Lilliston and one Clark were two "fakirs" who had been attending the Raleigh Fair, and on Thursday and Friday nights, they with others were at a house of ill-fame, engaged in gambling and drinking, and that a difficulty sprung up there on Friday night between these men over charges of cheating. On Saturday, October 21st, they went to the rail-

road station in Raleigh to take the train to leave the city, and there in the crowded reception-room they engaged in shooting at each other—the next room, separated only by a glass partition, being occupied by ladies and children. It is admitted by the prisoner that Clark fired two shots and then ran out of the east door and that Lilliston fired five shots. And these two men, who showed this contemptuous defiance of law and of the lives of so many peaceable people who were entitled to the protection of the law in their lives and persons, escaped unharmed, while one bystander was killed, another seriously wounded, and others narrowly escaped. If they fought willingly in such a place, the reckless disregard of ⁸⁵⁹ law amounts to malice, and if any bystander was killed both were guilty of murder—one as principal and the other as aiding and abetting. The homicide occurred in a crowded waiting-room. The doctrine is well settled that “malice is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life, and if the death of any person is caused by such act, it is murder. The most frequent instance of this species of murder is where death is caused by the reckless discharge of firearms under such circumstances that some one would probably be injured, and even where the discharge was accidental, resulting from handling the weapon in a threatening manner it was held murder”: 21 Am. & Eng. Ency. of Law, 2d ed., 153, and cases cited in the notes.

The jury have acquitted Clark; and Lilliston, convicted of murder in the second degree, presents in substance three grounds of alleged error in the conduct of the trial by the learned and impartial judge. He contends that the judge should have told the jury that there was no evidence against him either of murder in the second degree or manslaughter. It is admitted that Clark stood toward the southeast and fired northwestwardly two shots, one of which struck above the ticket office. Mr. Horton testified that he dropped behind the radiator and was struck on the buttock (which was exposed) by Clark's second bullet, which entered, he says, from the side Clark was on, and which could not have come from the direction where Lilliston was at that time. Of the five shots fired by Lilliston, the location of four found embedded in the building are admitted. The state contends that Lilliston's other ball was the one found in the body of Smith, the

deceased. There was evidence, if the jury believed it, that Lilliston dodged behind Smith, and that in the excitement, Lilliston, the lodgment of whose other balls showed that he was firing wildly, shot Smith. The prisoner contended that this was not true, also that it was Lilliston's ⁸⁰⁰ ball that struck Horton, and further that a man named Arnold shot Smith. Only seven balls were traced, including those lodged in the bodies of Smith and Horton. All these matters were purely issues of fact for the jury and not for the court. The court, in the words of the prisoner's prayer, charged the jury that "the defendant Lilliston contends that there is evidence before the jury that Arnold, one of the state's witnesses, shot and killed Smith in the north aisle of the waiting-room near the ticket office. The court charges the jury that if you have a reasonable doubt as to whether Arnold killed Smith or as to whether Lilliston killed Smith, it will be your duty to acquit Lilliston." The prisoner admitted that Smith was not killed by Clark. The bullet did not come from that side. He offered evidence tending to show that he fired in self-defense only, and there was evidence to the contrary, both that he began the difficulty, that he engaged in it willingly and continued firing while the other man was running.

These questions of fact were ably presented to the jury by counsel of great skill and long experience. There was evidence, as the judge properly held, to submit the case to the jury, and their finding is not reviewable by us. Had the judge who tried this cause and heard the witnesses, and could judge from their bearing as to the weight to be given their evidence, felt any doubt of the correctness of the verdict, it was in his power and it would have been his pleasure to set it aside. He refused to do so.

The prisoner also excepts to the following excerpt from his honor's charge: "Another principle of law is where in an indictment for murder the state has satisfied the jury beyond a reasonable doubt that the prisoner slew the deceased intentionally with a deadly weapon, nothing else appearing, the law presumes that the defendant is guilty of murder in the second degree, and the burden of proof shifts to the defendant to satisfy the jury, not beyond a reasonable doubt, but to simply ⁸⁰¹ satisfy them, that he was excusable or that the crime is for a lesser offense, to wit, manslaughter, which is, as I told you, the unlawful and felonious killing of

a human being with malice aforethought—that is to say, that the defendant is called on to satisfy the jury of the existence of such facts and circumstances as will rebut the presumption of malice raised by the use of a deadly weapon, and reduce the grade of the offense from murder in the second degree to manslaughter, or to go further and satisfy the jury of the existence of such facts and circumstances as will justify the killing on the plea of self-defense—that is, that the prisoner had reasonable apprehension, and did apprehend, that it was necessary for him to shoot in order to protect his own life or save himself from great bodily harm.” This charge is to be construed with the context, and reading it in connection with the whole charge we do not find any reversible error: *State v. Tilley*, 25 N. C. 424; *State v. Boon*, 82 N. C. 637; *State v. Holman*, 104 N. C. 861, 10 S. E. 758; *State v. Gentry*, 125 N. C. 733, 34 S. E. 706.

The prisoner further excepts to the following paragraph of the charge: “Self-defense exists where one is suddenly assaulted and in the defense of his person, where an immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant.” This paragraph is quoted from 1 Wharton on Criminal Law, ninth edition, section 306. We see no ground for criticism of the word “apparent.” It is favorable to the defendant. Had it been omitted and the word “actual” had been used, the prisoner would have excepted. Nor do the words “and there is no other probable means of escape” improperly restrict the right of self-defense upon the circumstances of this case. The judge did not restrict self-defense to cases of sudden assault, but the prisoner contended that this was a sudden assault, and the judge charged that in such cases the right of self-defense exists if there is apparent danger from “waiting ³⁶² for the assistance of the law and there is no other probable means of escape.” In *State v. Kennedy*, 91 N. C. 572, it is said: “There may be cases, though they are rare and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall.” This is cited and approved in *State v. Gentry*, 125 N. C. 733, 34 S. E. 706. The doctrine of *State v. Blevins*, 138 N. C. 668, 50 S. E. 763, and *State v. Hough*, 138 N. C. 663, 50 S. E. 709, is not in point here. Those cases hold that where a man is mur-

derously assaulted, without fault on his part, he is not required to retreat to the wall, but may stand his ground and kill to save his own life; but to confer such right it must appear that the assault upon him was sudden, fierce and continuous. But here, this was not true, for Clark fired only twice and then ran, and the prisoner testified that he fired himself five times, commencing when Clark was near the radiator in the center of the large room, and that he fired the last as Clark went out the east door. This evidence of Lilliston tends to show that Clark was not firing, but running, trying to escape. There was much other evidence to the same purport. In such state of facts the law is thus laid down in *State v. Hill*, 20 N. C. 629, 34 Am. Dec. 396: "Even if the prisoner had not begun the affray, but had been assaulted in the first instance, and then a combat had ensued, he could not excuse himself as for a killing in self-defense, unless he quitted the combat before a mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and had then killed his adversary of necessity to save his own life."

Here, though, "the fierceness of the adversary" abated immediately after the second shot (when he fled); the prisoner testified that he shot five times, some, if not all, of which shots were fired while Clark was getting from the radiator to the door, and as he went out of the door. It is worse than if he had killed the fleeing man, for he not only shot unnecessarily, not for his own protection, but in a crowded ⁶⁶³ waiting-room where his balls were much more liable to hit than if he had only one man before him. His honor told the jury that "where two people are engaged in an unlawful act, such as an affray in a public place, shooting at each other willingly—that is, fighting willingly, and not forced to fight in self-defense—and one kills a bystander, it is murder in the second degree or manslaughter, according as it is accomplished with or without malice." If Lilliston had killed Clark, the jury would have been justified, upon Lilliston's own evidence taken alone, in finding him guilty in that there was no necessity to do so to protect himself. He fired wildly, as he testifies himself, and the brief of his counsel says: "The evidence shows that four of the five balls Lilliston fired are located in the walls and seats of the waiting-room." Lilliston's fifth and last ball, his counsel con-

tends, was the one that struck Horton. Horton says that it was the second ball that was fired and that it struck him coming from Clark's direction. The disputed question was left to the jury, as was also the prayer as to Smith having been shot by Arnold, and the jury said that beyond all reasonable doubt in the minds of the twelve, Lilliston's ball was the one that killed Smith. It is useless to recapitulate the voluminous and somewhat conflicting evidence. The case was fairly and impartially tried and we find no reversible error.

The prisoner filed a motion in this court for a new trial for newly discovered evidence, which he avers would prove that Arnold fired the fatal shot. This motion has never been allowed in this court in a criminal case. But had it been made in a civil action, in which it is sometimes, though rarely, allowed, this motion would be disallowed, both because it would be merely cumulative of the evidence which was offered and which was submitted to the jury with a prayer thereon as requested by the prisoner, and for the stronger reason, that the state filed, before the argument here, the affidavit of O. L. Parham, jailer of Wake county, ³⁶⁴ that Lilliston "was in possession of the evidence of Mrs. Willie Richardson before his trial, because he (Parham) had heard him (Lilliston) talking about it with others in jail." He did not offer that evidence at the trial. The court, even in a civil case, would not seriously consider a motion for a new trial upon evidence which was withheld from the jury by the party moving.

It has uniformly been held that motions "for new trial for newly discovered evidence" and "rehearings" cannot be entertained in this court in criminal actions.

In *State v. Jones*, 69 N. C. 16, Reade, J., held that this court had no power to rehear in a criminal action, saying: "In equity cases and in civil actions, the practice has been common, but, in criminal cases, never to our knowledge."

In *State v. Starnes*, 94 N. C. 973, where a motion for a new trial for newly discovered evidence was made in a criminal action, it was denied, Smith, C. J., saying: "No such proposition in reference to criminal prosecutions has ever been made or entertained, so far as our investigations have gone, in this court. The absence of a precedent (for we cannot but suppose such applications would have been made on

behalf of convicted offenders if it had been supposed that a power to grant them resided in this appellate court) is strong confirmatory evidence of what the law was understood to be by the profession. We are clearly of the opinion that no such discretionary power as that invoked is conferred upon this court. In appeals from judgments rendered in indictments, our jurisdiction is exercised in reviewing and correcting errors in law committed in the trial of the cause, and to this alone: *State v. Jones*, 69 N. C. 16."

In *State v. Starnes*, 97 N. C. 423, 2 S. E. 447, *Smith, C. J.*, again says: "The motion, as far as our own and the researches of counsel disclose, is without precedent in the administration of the criminal law on appeals to this court, and is so fundamentally repugnant to the functions of a reviewing court,⁸⁶⁵ whose office is to examine and determine assigned errors appearing in the record, that we did not look into the affidavits offered in support of the motion, nor hesitate in denying it."

In *State v. Rowe*, 98 N. C. 629, 4 S. E. 506, *Davis, J.*, says: "Upon careful consideration, we must adhere to the principle that in criminal actions the appellate jurisdiction of this court is limited to a review and correction of errors of law committed in the trial below: *State v. Jones*, 69 N. C. 16; *State v. Starnes*, 94 N. C. 973." The cases cited show that the court adhered to its previous rulings on grounds broad enough to apply both to motions for "new trials for newly discovered evidence" and for "rehearings." The court then proceeded to point out that there was no ground for the innovation which was sought, since the governor could look into the entire merits of the case and render any relief justice should demand.

In *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540, the court dismissed the motion as a well-settled matter, merely saying that "such motions are not entertained in criminal cases, as has been often held." In *State v. Councill*, 129 N. C. 511, 39 S. E. 814, the matter was fully considered, and the court held that this court could not grant either rehearsings or new trials for newly discovered evidence in criminal actions. In *State v. Register*, 133 N. C. 746, 46 S. E. 21, it is again said that "the prisoner also moved this court for a new trial for newly discovered testimony, but such motions can only be made in civil actions. Our prece-

dents are uniform that this court has no jurisdiction to entertain such motion in criminal actions."

So the point is settled if the uniform practice of this court and its repeated and uniform decisions to the same effect can settle anything. But it is contended that all these decisions and the uniform practice are erroneous and should now be reversed. Counsel cite the statutes. In Laws of 1815, chapter 895, the power was first conferred to grant new trials in criminal cases (and the prisoner's brief admits ^{see} that it was then restricted to the superior court judges) as follows: "The judges of the superior courts of law are hereby empowered and authorized; upon application of the defendant, to grant new trials in criminal cases when the defendant or defendants are found guilty, in the same manner and under the same rules, regulations and restrictions as in civil cases, any law, usage or custom to the contrary notwithstanding."

In 1805 the title of the court of conference had been changed to "supreme court," and in 1810 the supreme court had been authorized to elect a chief justice, though it was not constituted as at present till the act of 1818, which went into effect January 1, 1819. In 1854, chapter 35, section 35, of the Revised Code, the words "courts of law" were substituted for "superior court judges," the object being, as stated in prisoner's brief, to limit the authority to the judge when sitting in a court of law instead of a court of equity.

The prisoner rests his argument to overrule the uniform decisions and settled practice of this court upon the following section 3272 of the Revisal, which reads, "The courts may grant new trials in criminal cases when the defendant is found guilty under the same rules and regulations as in civil cases." This clearly refers to the time "when he is found guilty," and when that section is turned to, it will be found further that it is under subhead "Trials, Superior Court," under which are grouped all the provisions peculiar to trials in that court, to wit, sections 3262 to 3273, inclusive, and the note of the commissioners to said section 327 shows that it was chapter 895, laws of 1815, and Revised Code, chapter 35, section 35, above quoted, which the prisoner's brief admitted applied only to the superior court, and was brought forward as Code (1883), section 1202, which was in force when the above decisions were made, and is now again brought forward in the Revisal, section 3272.

The constitution, article 4, section 8, is conclusive: ³⁶⁷ "The supreme court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference, and the jurisdiction of said court over 'issues of fact' or 'questions of fact' shall be the same as exercised by it before the adoption of the constitution of 1868." The power the court is now asked to exercise is not a matter of law or legal inference, even if it could be deemed "issues of fact" or "questions of fact"; such power was not exercised prior to the adoption of the constitution of 1868, as we have seen. Indeed, even when the court below granted or refused a new trial for other cause than error of law, as for newly discovered evidence, this court had no jurisdiction to consider it: *Holmes v. Godwin*, 69 N. C. 467. Motions for new trials for newly discovered evidence were equitable in their nature and did not extend to criminal actions until the aforesaid act of 1815, chapter 895, now Revisal, 3272, which extended the power only to the superior court.

But even if the constitution and the precedents did not forbid it, and it were an open question, this court ought not to grant new trials for newly discovered evidence in criminal actions for several reasons: First, there is no necessity for it (the sole ground on which they are allowed in civil actions), for the governor is vested with power to investigate the facts more fully than we could, and to do what justice shall require. There is no complaint that the executive has not been sufficiently liberal in its exercise. Again, it is the well-known complaint of our governors that, in matters of this kind, insistence and pressure have been often too great. This court has no time for such applications and no disposition to seek or invite them. The constitution has wisely restricted our power in criminal cases to reviewing on appeal "decisions of the courts below in matters of law or legal inference."

And lastly, the odds against the state in a trial for a capital ³⁶⁸ offense are already sufficiently great. The prisoner has twenty-three peremptory challenges against four for the state; the prisoner can be found guilty only by a unanimous verdict, beyond the reasonable doubt, of twelve men; but if one juror entertains such a doubt, there can be no conviction. In England to this day the defendant cannot appeal

in a criminal case, but here, though the defendant can appeal, the state cannot, however erroneous the rulings of the judge (though formerly the state could appeal here from a verdict of not guilty and still can do so in Connecticut and some other states). There are, too, many fine distinctions and technicalities which are urged on an appeal, and still other advantages in favor of one charged by a grand jury with killing his fellowman and disadvantages to the state, besides the unlimited right of appeal to the governor and the absence of any restriction upon his power of commutation, reprieve or pardon. Even if the court possessed the power, it should not add another serious disadvantage to those under which the state is already placed, when endeavoring to enforce the guaranty of safety of life and limb to its citizens, by seeking the conviction of those who have done murder. These disadvantages are far greater now than is necessary to make sure the acquittal of the innocent. The "bloodiest" possible administration of the law is that which permits murder, by making conviction of the guilty more difficult.

"Mercy murders, pardoning those who kill."

In refusing to entertain such motions in criminal cases, we are adhering to the uniform practice and rulings of the court from the first day of its existence down to the present. We are refusing to make an innovation. The object of punishment for murder is not to reform the offender, but, by the certainty of infliction and its unpleasant nature, to deter others from the like offenses. The number of homicides in North Carolina, as recorded in the United States census and the annual reports of the attorney general of this state, is ~~so~~ much larger annually, in proportion to population, than in most of the other states. The object to be sought in the administration of the law is to diminish the number. This cannot be done by adding to the disadvantages now imposed upon the state, in such trials, beyond what has been done in the past. If punishment deters from crime (which is its object), then that homicides are more frequent here than in most states shows a lack of efficient enforcement of the law in such cases. It is not for the courts to add additional difficulties to its enforcement.

No error.

Justices Connor and Walker Dissented on the ground that error was committed by the trial court in defining to the jury the right of self-defense, as set out in the main opinion supra. In this connection Mr. Justice Connor said:

"Without undertaking to discuss the question at length, I find the law as approved by this court laid down by Mr. Justice Bynum, in *State v. Dixon*, 75 N. C. 275: 'The general rule is, "that one may oppose another attempting the perpetration of a felony, if need be, to the taking of a felon's life"; as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is justified: 2 Bishop's Criminal Law, sec. 632. A distinction which seems reasonable and is supported by authority is taken between assaults with felonious intent and assaults without felonious intent. In the latter the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force, and give blow for blow. In this class of cases, where there is no deadly purpose, the doctrine of the books applies, that one cannot justify the killing of the other, though apparently in self-defense, unless he first "retreat to the wall." In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to flee; he may stand his ground and kill his adversary if need be: 2 Bishop's Criminal Law, sec. 6333, and cases there cited. And so Mr. East states the law to be: "A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, burglary, robbery and the like upon either." In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense.'

"This I consider to be the correct statement of the law as frequently approved in this court: *State v. Matthews*, 78 N. C. 523; *State v. Castle*, 133 N. C. 769, 46 S. E. 1; *State v. Clark*, 134 N. C. 698, 47 S. E. 36; *State v. Hough*, 138 N. C. 663, 50 S. E. 709; *Wharton's Criminal Law*, 9th ed., secs. 306, 487."

The Law of Self-defense is discussed at length in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717.

Unintentional Homicides in the commission of unlawful acts are considered in the note to *Johnson v. State*, 90 Am. St. Rep. 571-583. At page 577 of this note will be found authorities on the criminal liability of parties to a fight, when they unintentionally kill a third person; and at pages 581-583 will be found authorities on homicides resulting from the reckless use of firearms.

SAWYER v. NORFOLK AND SOUTHERN RAILROAD.

[142 N. C. 1, 54 S. E. 793.]

SLANDER BY CORPORATION.—Corporations may become civilly liable for slander. (pp. 717, 718.)

CORPORATIONS—Liability for Torts.—Private corporations are liable for their torts committed under such circumstances as would attach liability to private persons. That the conduct complained of necessarily involved malice or was beyond the scope of corporate authority, constitutes no defense. (p. 718.)

SLANDER BY CORPORATION—Act by Servant—Test of Liability.—The liability of a corporation for slander or other malicious tort committed by its servant depends entirely on the relationship of master and servant, and the test of responsibility is whether the slander or tort was committed by authority of the master expressly conferred or fairly implied from the nature of the employment or the duties incident to it, and when the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be referred to the jury to determine whether the tortious act was authorized. (pp. 719, 720.)

SLANDER BY CORPORATION—Act of Superintendent.—If a person goes to the office of the superintendent of a corporation to get employment, and such superintendent, after telling him that the corporation will not employ him, proceeds to insult and defame him, the corporation is not liable for the slander, as such act is not within the scope of the employment of its superintendent. (pp. 720, 721.)

The alleged slander appears from the testimony of the plaintiff Sawyer, who, prior to 1904, had worked for the defendant company for several years helping to load truck at one of its sidetracks. He testified as follows:

“Up to 1904 there had been no complaint about my work. In this month I went to Norfolk and went in to see W. W. King in his office. His office was in the general office of the defendant company. The general office is a large building, sixty by one hundred feet, on the second floor. There was a large room cut up into different sections by railings from three to four feet high, and W. W. King's section was to the left as you enter. While in his room I could see many people at work in the several sections; some twenty or thirty were in sight of me, and five or six near enough to hear what was said—these within eight or ten feet of me. I went in Mr. King's office to see him on business, viz., to see if the company wanted to employ me to attend to the loading and shipping of the truck at Belcross station during the trucking season, as they had done in the previous years. I asked

him, when he came in, if he wanted to employ me to attend to the loading and shipping of truck at Belcross as he had done heretofore. He said: 'No. I don't want any such man as you are.' That I had robbed the company and was doing so every chance I got. 'And as to the shortage on potatoes you claim, they were never grown, marked, loaded, or put in the cars. If they had been, they would have been in there when the car got to New York. I do not intend to pay for them. And as to the stock that has been killed by the company, I have paid for them all.' I then told him that I had not received the pay, if he had paid it; that it must be in the hands of some employé or in his possession. I had never received it. He spoke the whole conversation in such an abrupt and insulting manner that of course I was mad. I then went out of the office into the office of the auditor, Mr. Glazier, which was the adjoining section. I had not at that time been paid for the stock.

"I had not worked for them nor had any connection with them since August, 1903, the close of the trucking season.

"Mr. W. W. King was the superintendent in charge of the work—shipping truck. I had never robbed the company in any way. I looked after the whole of the shipping at Belcross on the sidetrack at my farm. I saw the truck was properly loaded, marked, and counted, and reported to the agent for billing purposes. Each piece was properly counted, loaded and reported to the agent of the defendant company."

At the close of plaintiff's testimony, defendant's motion for a nonsuit was granted and plaintiff appealed.

Aydlett & Ehringhaus, for the plaintiff.

Pruden & Pruden and Shepherd & Shepherd, for the defendant.

* HOKE, J. There is some authority for the position that corporations cannot in any case be held civilly liable for slander. And it has also been held, and is so stated in several of the text-books, that they are only so responsible when it affirmatively appears that they expressly authorized the very words which form the basis of the charge. The first position does not rest on any very satisfactory reason and has been generally rejected; and the second, we think, can only be received with much qualification.

It is now well established that private corporations under certain circumstances will be held liable for torts, both negligent ⁵ and malicious, on the part of their servants, agents and employes. The doctrine is stated in Jaggard on Torts, page 167, section 58, as follows: "Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice or was beyond the scope of corporate authority, constitutes no defense to their liability"; and this statement is in accord with well-considered decisions in this and other jurisdictions: *Hussey v. Norfolk S. R. R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Jackson v. American T. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Philadelphia etc. R. R. Co. v. Quigley*, 62 U. S. 202, 16 L. ed. 73; *National Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750, *Palmeri v. R. R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136.

According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employes of the company, and sometimes the facts present an additional element and involve some independent duty which the corporation may owe directly to third persons, the injured or complaining party. This distinction will be found suggested and approved in 1 Jaggard on Torts, page 257, section 85:

"Course of Employment: Another conception of the master's liability rests on the proposition that in certain cases the liability arises, not from relationship of the master and servant exclusively, but also from the duty owed to plaintiff by defendant in the particular case in issue. In dealing with cases in which the question of the liability of the master for the tort of his servant is raised, reference should be had not alone to the relationship of the master and servant, but also to the relationship between the master and the third person complaining of injury. It would seem that the scope of authority test considers too exclusively, the form of relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be in personam or in the nature ⁶ of the right in personam. as where a passenger complains of the torts of a carrier's

servants, or a customer of the torts of a proprietor's servant."

And Hale on Torts, at page 147, gives the same distinction. It will be noted that the instances given by both of these authors, under the second class, are where the conduct complained of on the part of the employé in the course of his employment was in breach of some duty which the employer owed directly to the passenger in the one case and the customer in the other. They had been invited upon the premises, and were there by invitation and under circumstances which gave them the right to considerate and courteous treatment; and, in the case of the carrier, this obligation was further enforced and could be made to rest on the duty arising to the public by reason of its quasi public character, growing out of its chartered privileges, as in *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 23 S. E. 327, 4 L. R. A., N. S., 485.

In the case at bar, however, there is no responsibility attaching by reason of the breach of any special duty owed to the plaintiff by reason of his placing or by reason of the special circumstances of the case. The plaintiff was not a passenger, nor was he in the office by any invitation of the company, general or special. On the contrary, he had gone to the office to see King, the superintendent, of his own motion and for his own advantage—the men were at arm's-length considering a business proposition affecting the plaintiff's interest.

The case, then, is one where responsibility must attach, if at all, simply and exclusively by reason of the relationship which King bore to the company and the power given him to select and employ the plaintiff as one of the company's agents. In cases of this character the responsibility of a corporation for slander or other malicious torts, by its agents and employés in the course of their employment, depends in its last analysis on whether the acts complained of were authorized⁷ or ratified by the company. The test of responsibility established by the better considered authorities being, "whether the injury was committed by the authority of the master, expressly conferred or fairly incident to it." When such authority is express, the matter is usually free from difficulty; but the authority may be implied, and on a given state of facts admitted or es-

tablished, frequently is conclusively implied, and responsibility imputed as a matter of law.

In other cases, where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized.

And, again, the absence of authority may be so clear that it becomes the duty of the judge to determine the matter, as he did in this instance.

In *Wood on Master and Servant* may be found a very extensive and satisfactory discussion of this question. In section 279, page 535, the author says: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

And, again, the same author, in section 307, says: "The simple test is whether they were acts within the scope of his employment; not whether they were done while ^s prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders."

Applying these principles to the facts before us, we are of opinion that the ruling of the judge below was clearly correct. As stated, the plaintiff was voluntarily in the office of King (the superintendent) to look after business in his own interest, and the company owed him no independent duty. Granting that King had power to select and employ the plaintiff as agent of the company, when he told the plaintiff that the company did not wish to employ

him he had filled the measure of his duty; and when King went further, whether from bad temper or malice or from righteous indignation, and proceeded to insult and defame the plaintiff, he was entirely beyond any authority given him either expressly or which could be fairly implied from the nature of his employment or the duties incident to it; and for such conduct, therefore, King, as an individual, and not the company, is responsible.

The general principles here applied will be found very fully and clearly discussed in two recent opinions by this court delivered by Mr. Justice Walker: *Daniel v. Atlantic C. L. R. R.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, and *Jackson v. American T. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738. And our disposition of this case is sustained by well-considered decisions of the federal court in *Text-book Co. v. Heartt*, 136 Fed. 129, and *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43 L. ed. 543.

There is nothing in *Hussey v. Norfolk S. R. R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923, that in any way militates against our present decision. That was a case in which the complaint charged that defendant company had maliciously slandered the plaintiff. There was a demurrer, * which admitted that the defendant had uttered the words, and the decision simply held, as we have here, that a corporation could under given circumstances be held responsible for the malicious torts of its agents. The question of when or under what circumstances the acts of the agent will be imputed to the company was in no way involved.

There was no error in directing a nonsuit, and the judgment below is affirmed.

LIABILITY OF CORPORATIONS FOR LIBEL AND SLANDER.

I. General Liability, 721.

II. Liability for Act of Agent, 723.

III. Criminal Liability, 724.

IV. Measure of Damages, 725.

V. Liability for Slander, 726.

I. General Liability.

The rule is firmly established that a corporation aggregate may be liable in a civil action for damages for publishing a malicious libel, although necessarily the actionable act must be done by its

servant or agent: *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207; *Howe Machine Co. v. Souder*, 58 Ga. 64; *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. R. A. 581; *Bacon v. Michigan Cent. R. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; *McDermott v. Evening Journal Assn.*, 43 N. J. L. 488, 39 Am. Rep. 606; *Evening Journal Assn. v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392; *Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 887; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73.

A corporation may make and be held liable for making a libelous publication, and in doing so it must act through an agent, for it cannot act otherwise; and if there is proof that an agent, within the scope of his authority, caused the publication to be made, or acting within the scope of his authority ratified it after it was made, the corporation is liable: *Howe Machine Co. v. Souder*, 58 Ga. 64.

This rule applies with especial force to corporations organized for the very purpose of publishing newspapers and books: *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 565, 65 Mo. 539, 27 Am. Rep. 293; *McDermott v. Evening Journal*, 43 N. J. L. 488, 39 Am. Rep. 606; *Hoboken Printing etc. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053.

But the officers, stockholders or members of a publishing corporation are not liable for a libelous publication simply because of official position or membership, but if they in any way aided, assisted or advised its publication or circulation, or their duties as officers or agents were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that they knew, or ought to have known, of the publication, they are liable and cannot defend on the ground merely that they did not know about the libel until after it was published: *Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 889. And if a libel is published by a newspaper corporation, the president thereof is not individually liable therefor because of his official capacity either as president or stockholder, in the absence of his personal participation in such publication: *Folwell v. Miller*, 145 Fed. 495.

The rule that corporations may become civilly liable in damages for libel is by no means confined to publishing corporations, however, and a railroad company may be mulcted in damages for a malicious libel published by its agents, acting in its behalf and in the course of its business and of their employment: *Bacon v. Michigan Cent. R. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; and

a telegraph corporation may be liable for a libel, even in punitive damages, in transmitting over its line to different stations libelous matter concerning a person: *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. ed. 581. But a railroad company is not liable for a libel of an employé published by its general superintendent without authority from the corporation, nor is the superintendent himself responsible, when there is no evidence submitted that the libelous article was dictated or even inspired by him: *Henry v. Pittsburgh etc. R. R. Co.*, 139 Pa. 289, 21 Atl. 157.

To constitute libel by a corporation, there must be malice, actual or implied, on its part, the malice being actual when the publication is made through motives of ill-will and with intent to injure or defame, and is implied or presumed in law when the article published is libelous *per se*: *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392.

II. Liability for Act of Agent.

A corporation may make a libelous publication, and in doing so it must act through an agent, for it cannot act otherwise: *Howe Machine Co. v. Souder*, 58 Ga. 64. But where an action against a corporation is predicated upon libelous matter contained in a letter written by its agent, a judgment against the corporation will not be sustained where there is no evidence from which a jury could properly infer express or implied authority on the part of the author of the letter to act as the agent of the corporation or to make any communication in its behalf: *Southern Express Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379. In other words, a corporation is not liable for a libel by its agent, not in the course of his duty, nor authorized nor approved by the corporation: *Southern Express Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379. But if there is proof that an agent of a corporation, within the scope of his authority, caused the publication to be made, or, acting within the scope of his authority, ratified after it was made, the corporation is liable therefor: *Howe Machine Co. v. Souder*, 58 Ga. 64. For libel committed by the agent of a corporation in the course of its business and of his employment, the corporation is liable in the same way and to the same extent that an individual would be liable under similar circumstances: *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73. And a corporation is responsible in damages for the publication of a libel, which is shown to have been made by its authority, or to have been ratified by it, or to have been made by a servant or agent in the course of the business in which he was employed: *Fogg v. Boston etc. R. R. Corp.*, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109. So a corporation is liable in damages for a libel, the publication of which was sanctioned by its manager in a matter which concerned the business of the company: *Pattison v. Gulf Bag Co.*, 116 La. 963, 114 Am. St. Rep. 570, 41 South. 224. Or a corporation engaged in publishing a

newspaper is answerable to a person libeled therein, to the same extent that an individual would be in making such a publication, when the evidence plainly justifies an inference that the libelous article was received, edited, and published by some agent of the company, employed for that purpose: *Hoboken etc. Pub. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053. But the editor in chief of a newspaper owned and operated by a corporation of which such editor in chief is president is not, individually, civilly liable for the publication of a libel by his subordinate, of which such editor in chief had no knowledge, and which was published during his absence from the office: *Folwell v. Miller*, 145 Fed. 495; *Nevin v. Spieckemann* (Pa.), 4 Atl. 497. On the other hand, it has also been decided that the managing editor of a newspaper owned by a corporation and published by it is equally liable with the proprietor and publisher for the publication of a libelous article, whether he knew of the publication or not: *Smith v. Utley*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. And it has also been decided that the officers, stockholders, or members of a publishing corporation are not liable for a libelous publication simply because of their official position or membership, but if they in any way aided, assisted, or advised its publication or circulation, or their duties as officers or agents were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that, as such agents, they either knew, or ought to have known, of the publication, they are liable, and cannot defend on the ground merely that they did not know about the libel until after it was published: *Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 889.

If, in a suit for libel against a newspaper corporation, it appears that information of the falsity of the statements contained in the article was brought home to the reporter writing the article for the defendant corporation before the article was published, the corporation is liable, and the jury may award exemplary damages: *Hatt v. Evening News Assn.*, 94 Mich. 114, 53 N. W. 952.

If the agent of a telegraph company, acting within the scope of his authority, maliciously transmits a libelous message to another agent of the same company for delivery to a third person, the telegraph company is liable in punitive damages: *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. ed. 581.

III. Criminal Liability.

In some jurisdictions a corporation is indictable for a libel published maliciously by it: *State v. Atchison*, 3 La. 729, 31 Am. Rep. 663; *Wabash P. & P. Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904. And where the corporation is subject to a criminal prosecution for publishing the libel, no exemplary damages can be assessed against

it in a civil action based thereon: *Wabash P. & P. Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904.

IV. Measure of Damages.

A corporation may become civilly responsible for libel in damages, actual or exemplary, according to the circumstances of the case: *Childers v. San Jose etc. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Missouri Pacific Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280. And exemplary damages may be awarded against a corporation when it is shown that it has published a libel with express malice, through gross negligence, or where the article published is libelous per se; *Childers v. San Jose Mercury etc. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. ed. 581; *Missouri etc. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280; *Morning Journal Assn. v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; *Smith v. Sun etc. Assn.*, 55 Fed. 240, 5 C. C. A. 91; *Cooper v. Sun etc. Assn.*, 57 Fed. 566. The malice of the editor of a newspaper corporation in composing and publishing a libelous article is the malice of the corporation, which is liable therefor in exemplary damages: *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093.

In an action against a corporation for libel, a jury is authorized to give such exemplary damages as the circumstances require, if the evidence shows that the publication was the result of that reckless indifference to the rights of others and through gross negligence: *Morning Journal Assn. v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; *Cooper v. Sun etc. Assn.*, 57 Fed. 566. Exemplary damages may be recovered in such cases, when malice on the part of the defendant corporation is shown as a fact, either actually or by presumption, or inference of fact from the libelous character of the publication: *Childers v. San Jose Mercury etc. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392. If a corporation engaged in publishing a newspaper libels a person therein with express or implied malice, and upon retraction being demanded, publishes a second article which may be construed as a covert and evasive reiteration of the original charge, damages of an exemplary or punitive character may be allowed: *Hoboken P. & P. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053.

If in a suit for libel it appears that information of the falsity of the statements contained in the article was brought home to the reporter of the defendant newspaper corporation before the article was published, the jury may properly award exemplary damages against the corporation: *Hatt v. Evening News Assn.*, 94 Mich. 114,

53 N. W. 952. The employment of competent reporters and editors, the supervision by proper persons of all that is to be inserted for publication in a newspaper, and the establishment and habitual enforcement of such rules as would probably exclude improper items, should exempt the corporation from any aggravation of damages on account of the express malice of such agents, for any libel published without the privity or approval of the corporation, but if it appears that it was wanting in reasonable care to prevent abuses, then it is liable for exemplary damages for its own misconduct: *Detroit Daily Post Co. v. McArthur*, 16 Mich. 446. If a publishing company prints an out of town dispatch, which is rendered libelous by an error in transmission, punitive damages will be justified on the ground that it was a wanton disregard of the rights of others not to have the dispatch repeated to insure accuracy, although that would have involved extra expense and loss of time: *Press Pub. Co. v. McDonald*, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53. On the other hand, if there is no evidence that the corporation published the libel maliciously or wantonly or through gross negligence, exemplary or punitive damages cannot be recovered: *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280; *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73. Neither are punitive damages recoverable in a libel suit against a corporation when the jury decides that all the actual damages sustained are merely nominal: *Stacy v. Portland Pub. Co.*, 68 Me. 279. In a suit for libel against a newspaper corporation, in charging plaintiff with larceny, no exemplary damages can be assessed in Indiana, as under the statute in that state the defendant is subject to a criminal prosecution for such libel. In deciding this point the court said that "it has been a long and well-established rule in this state that for wrongs, the commission of which subject the wrongdoer to both criminal prosecution and civil action, exemplary damages cannot be assessed: *Wabash P. & P. Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904.

V. Liability for Slander.

Although there are very few cases on the subject, the liability of a corporation for a slander uttered by its agent seems to stand on a different footing in some respects from its liability for a libel published by him. As to the slander, the law deems it to arise from the personal malice of the agent rather than from an act performed in the course of his employment or in the interest of the corporation, and exonerates the corporation unless it authorized, ratified or approved the slander uttered by its agent: *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392; *Hudnell v. Eureka Lumber Co.*, 133 N. C. 169, 45 S. E. 532. Thus if a corporation authorizes its state agent to make a settlement with its subagent, it is not liable to the latter for slanderous statements made by the former pending the settlement,

if the corporation neither expressly nor impliedly authorized the statements, nor ratified them: *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392. One corporation may be held civilly liable in damages for slandering the business of another corporation carrying on the same business, when it expressly authorizes such slander, and expressly employs a person to repeat such slander to and among the plaintiff's customers: *Buffalo etc. Oil Co. v. Standard Oil Co.*, 42 Hun, 157.

THOMPSON v. SILVERTHORNE.

[142 N. C. 12, 54 S. E. 782.]

COTENANCY—Action to Recover Possession.—A cotenant or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession thereof, except when the property is destroyed, carried beyond the limits of the state, or when, being of a perishable nature, such disposition of it is to be made as to prevent the other from recovering it, and it is not sufficient that defendant forcibly took the property from his cotenant's possession. (pp. 727, 728.)

PARTITION OF PERSONALTY—Injunction—Receiver.—If, pending a proceeding for the partition of personalty, the defendant threatens the destruction or removal of the property, he may be enjoined or a receiver may be appointed. (p. 728.)

W. C. Rodman, for the plaintiff.

Small & MacLean, for the defendant.

¹³ CONNOR, J. Plaintiff sued for possession of certain logs described in his complaint. After the testimony was in, counsel stated to the court that he would contend that he had by his testimony proven that the person under whom plaintiff claimed and defendant were tenants in common of the land from which the logs were cut and also tenants in common of the logs in controversy; that defendant took them by force from his possession. His honor intimated that if plaintiff established such state of facts he would instruct the jury that he was not entitled to recover; whereupon plaintiff excepted, and submitted to a judgment of nonsuit and appealed. The sole question presented upon the appeal is whether his honor was correct in the instruction which he proposed to give the jury. Plaintiff concedes the well-established principle that one tenant in common, or joint owner of personal property, cannot maintain

an action against the other tenant or owner to recover the exclusive possession of the property: *Grim v. Wicker*, 80 N. C. 343; *Strauss v. Crawford*, 89 N. C. 149. He calls attention to the exceptions to the general rule, and contends that he brings himself within one of them, for that defendant forcibly took the logs from his possession, and he is entitled to be restored to his original status. Mr. Justice Ashe, in *Grim v. Wicker*, 80 N. C. 343, thus states the exceptions to ¹⁴ the general principle: "The only exceptions to this principle are when the property is destroyed, carried beyond the limits of the state, or when, being of a perishable nature, such disposition of it is made as to prevent the other from recovering it"; citing *Lucas v. Wasson*, 14 N. C. 398, 24 Am. Dec. 266, in which it is said: "It is not sufficient to show that defendant took forcible possession of the chattel and carried it away." The principle was applied in *Shearin v. Riggsbee*, 97 N. C. 216, 1 S. E. 770. We do not think the language used by the court in that case conflicts with the authorities cited. The right of the plaintiff upon the facts relied upon was to have partition. If, pending the proceeding for that purpose, the defendant threatened the destruction or removal of the property, the court would, upon application, have enjoined him, or, if necessary, appointed a receiver. We concur with the ruling of his honor.

The judgment of the nonsuit must be affirmed.

A Cotenant out of possession of personal property has no remedy at law against his cotenant in possession unless the latter's dealing with the property amounts to a conversion: Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417. As to the liability of one cotenant to the other for a conversion of timber, see *Sullivan v. Sherry*, 111 Wis. 476, 87 Am. St. Rep. 890; *Leader v. Plante*, 95 Me. 343, 85 Am. St. Rep. 418; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238.

LANE v. FIDELITY MUTUAL LIFE INSURANCE COMPANY.

[142 N. C. 55, 54 N. E. 854.]

INSURANCE, LIFE.—Forfeiture of Policy—Reinstatement.—

If an insured person has forfeited his policy of life insurance by the nonpayment of dues, and has then complied with a provision in the policy that "delinquent members may be reinstated if approved by the medical director and president by giving reasonable assurance that they are in good health," but the officers of the insurance company decline to approve his application, he is not entitled to recover damages for the cancellation of his policy and refusal to reinstate him, in the absence of any showing that the action of such officers was fraudulent or arbitrary. (pp. 729, 730.)

INSURANCE, LIFE.—Forfeiture of Policy—Reinstatement.—

A provision in a policy of life insurance that delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurance that they are in continued good health, is valid and reasonable, and the required approval is not merely a ministerial act, but involves the exercise of judgment and discretion. (p. 730.)

W. D. McIver and O. H. Guion, for the plaintiff.

Hinsdale & Son and W. W. Clark, for the defendant.

⁵⁷ WALKER, J. It is conceded that the plaintiff, under the terms of the contract of insurance, ⁵⁸ had forfeited his policy and consequently his membership by the nonpayment of his annual dues. He had no right to be restored to his former relation without the consent of the defendant, and then only upon the terms and conditions prescribed by it. There is a provision in this policy by which the plaintiff could be reinstated as a member and policyholder, but the condition precedent was imposed that his application for reinstatement shall first be approved by the president and medical director of the company, and that that he shall give reasonable assurance that he is still in good health.

It seems clear to us that the approval required in the case is something more than a mere ministerial act and involves the exercise of judgment and discretion: *State v. Smith*, 57 Pac. 449. The word "approve" is "to regard or pronounce as good; think or judge well of; admit the propriety or excellence of; be pleased with; commend": *Webster's International Dictionary*; 1 Words and Phrases, Jud. Def., 475. In the absence, certainly, of any showing that

the approval of the officers has been fraudulently withheld and that their denial of the application is purely arbitrary, we do not see why their refusal to reinstate the plaintiff is not fatal to his right of recovery in this action. We are not called upon in this case to say under what circumstances, if any, we would decide that the action of the officers designated to pass upon the application of a delinquent member could be investigated, with a view to ascertain whether they have exercised their judgment properly or have unreasonably deprived him of any right to which he is entitled under the terms of his contract and the by-laws of the company. Where there is no suggestion of fraud or other legal wrong, there can be no valid reason why the applicant should be permitted to attack the soundness of their judgment or the justness of their conclusion. We must hold it to be right, and unassailable in any such manner, because the parties have solemnly agreed that ⁵⁹ the matter shall be decided in that way, and we have no power to change their contract; and, besides, the power lodged with those officers is consistent with the purposes of the organization, and its exercise is necessary for the protection of the rights of other members and is not otherwise at all inconsistent with reason and justice. A provision for approval by officers most likely to know the facts is one which would naturally be suggested to those engaged in the prudent management of the affairs of the association as essential to conserve the interests of all parties concerned. The validity of such a clause in policies of this kind has been sustained by numerous authorities, and there are none, we believe, to the contrary: 2 Joyce on Insurance sec. 1276; 2 Bacon on Benefit Societies, sec. 385c; Butler v. Grand Lodge, 146 Cal. 172, 79 Pac. 861; Saerwin v. Jamon, 65 N. Y. Supp. 501; Coniff v. Jamour, 65 N. Y. Supp. 317; Brun v. Supreme Council, 15 Colo. App. 538, 63 Pac. 796; McLaughlin v. Supreme Council, 184 Mass. 298, 68 N. E. 344.

As the policy had been forfeited and plaintiff's connection with the defendant had been severed by his own default, he had no right to be readmitted to membership, but his reinstatement was then dependent upon the mere favor of the company, which could be extended to him subject to such terms as it deemed necessary for its protection. The very question was decided in Harrington v. Keystone Mut. Ben. Assn., 190 Pa. 77, 42 Atl. 523, in which it appeared

that the executive committee was "empowered" to reinstate a delinquent member. The court there said: "Conceding, for the purpose of argument, that her application was in time, and that she complied or was ready and willing to fully comply with all the terms and conditions of the by-laws above quoted, it does not follow that the committee was bound to reinstate her to membership in the association. While the by-laws empowered them to grant her request, they were not bound nor could they be compelled to do so. It neither clothed her with any legal or equitable right, nor did it impose any duty or obligation ⁶⁰ on the association that would enable her, as a delinquent member, to maintain this action."

While it may not be necessary for us to go to the extent the court did in that case, we yet think our case is stronger than that one so far as the discretionary nature of the power is concerned. In the case of *Lovick v. Providence Life Assn.*, 110 N. C. 93, 14 S. E. 506 (cited and relied on by the plaintiff's counsel), the policy provided that the delinquent should have the "opportunity for reinstatement on similar conditions," the context showing clearly that the term "similar conditions" had reference to the payment of past-due premiums, assessments, and other indebtedness. By opportunity we mean "fit or convenient time; suitable occasion; time or place favorable for executing the purpose or doing the thing in question": *Webster's International Dictionary*. It was, therefore, properly held in *Lovick's* case (110 N. C. 93, 14 S. E. 506), that if the plaintiff seasonably tendered the back dues, he was entitled to reinstatement, and, being thus entitled, he could recover the premiums paid, if the company refused to reinstate him. There was nothing in the policy then being construed which required the approval of the company or any of its officers as a condition precedent to the reinstatement or the exercise of any discretion or judgment.

The court charged in this case that if the plaintiff applied for reinstatement and was refused after he had furnished proof of his good health, the first issue should be answered "Yes." In this there was error. The instruction excludes altogether from the consideration of the jury the question of approval by the president and medical director, and makes the recovery depend entirely upon the application and proof of good health, contrary to the very terms of the

policy, and without any reference to the other valid provisions of the by-laws. This of itself entitles the defendant to a new trial. But as there was no evidence to warrant a verdict for the plaintiff, the court should have granted the defendant's motion to nonsuit, and dismissed the action, and there was ⁶¹ error in refusing to do so. It is not necessary now to discuss the interesting question presented by the defendant's exception in regard to the statute of limitations, in view of the decision we have already made, that there has been no revival of the policy.

Error.

For Authorities upon the right of an insured person to reinstatement after a suspension or forfeiture of his policy, and the effect of such reinstatement, see the note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 577; *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862.

IVES v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

[142 N. C. 131, 55 S. E. 74.]

STATUTE OF FRAUDS.—Growing Trees.—A part of the realty, and a contract to sell or convey them, or any interest in or concerning them, must be reduced to writing. (p. 735.)

STATUTE OF FRAUDS.—Contract for Cordwood.—A contract to cut and convert trees growing on land belonging to a railroad company into cordwood, and for the delivery thereof on the railroad right of way, does not contemplate the transfer of any title to or interest in growing trees as they stand upon the land, and is therefore not within the statute of frauds. (p. 735.)

STATUTE OF FRAUDS.—Contract to Cut and Deliver Growing Trees.—A contract by the owner of land to cut growing timber therefrom, and when severed from the freehold to deliver it to another for a stipulated price, is not within the statute of frauds. (p. 736.)

TRIAL.—Challenges to Jurors.—A party to an action cannot make a valid exception to the ruling of the court sustaining the other party's objection to a juror where the first party has not exhausted his peremptory challenges, and it appears that the jury chosen to try the case constituted a panel entirely acceptable to both parties. (pp. 737, 738.)

EVIDENCE.—Breach of Contract.—In an action to recover for breach of contract, evidence that one of the parties borrowed money to enable him to fulfill his contract is admissible upon the issue as to his ability and readiness to perform his part of the agreement. (p. 738.)

EVIDENCE—Breach of Contract—Act of Agent.—In an action to recover for breach of contract, evidence of what defendant's agent especially deputed to make and execute such contract said and did in that particular transaction is admissible. (p. 738.)

TRIAL—Instructions.—A party desiring more definite instructions must make a special request for them. (p. 739.)

D. L. Ward and W. W. Clark, for the plaintiff.

W. C. Munroe, P. M. Pearsall, A. D. Ward and O. H. Guion, for the defendant.

¹³¹ **WALKER, J.** The action was brought to recover damages for breach of an oral contract between the parties by which the plaintiff ¹³² agreed to cut for the defendant and deliver along its right of way fifteen thousand cords of wood, three thousand cords of which were to be cut from the plaintiff's land and the balance from the land of the defendant. For the three thousand cords the defendant agreed to pay two dollars per cord and for the remainder one dollar and seventy-five cents per cord; the defendant, as to the latter, being allowed a deduction on the price of twenty-five cents per cord for what is called "stumpage," that is, for the trees furnished by it or cut on its land. Plaintiff cut five thousand and ninety cords, for which he was paid, and he cut and was ready to deliver five thousand one hundred and eighty-four cords, and has cut and delivered seven hundred and forty-eight cords, for which he was not paid, making ten thousand nine hundred and eighty-six cords, and leaving uncut four thousand and fourteen cords. There were eleven hundred and forty of the five thousand and ninety cords which were not delivered on the right of way, because it was already full of other wood and there was no room for it. This was hauled by plaintiff to his tramway and was ready for delivery, when defendant directed that it should be inspected and paid for. Six hundred cords of it were afterward delivered on the right of way. The plaintiff alleged that he had been prevented from complying fully with his part of the contract by the wrongful acts of the defendant, although he was at all times ready, able and willing to do so; and there was evidence tending to support the allegation. There was evidence tending to show that the plaintiff had not complied in all respects with the contract on his part. It was also in evidence that there had been no breach of the contract by the defendant, until after the road was leased, the former

president of the defendant company stating that he would have carried out the contract fully had he been continued in office. The defendant pleaded a counterclaim consisting of eleven hundred and ninety-three dollars paid to the plaintiff for the eleven hundred and forty cords of wood cut from its land, which it alleged had not been delivered on the right of way and which had become worthless, and two hundred and eighty-five dollars for stumpage and four hundred and thirteen dollars and forty cents for quarters erected for the plaintiff's hands at his request, making in all two thousand six hundred and ninety-one dollars and forty cents; and there was some evidence to sustain the demand.

¹³³ The plaintiff objected to a juror, N. H. Russell, upon the ground that he was now in the employ of the lessee of the defendant and had formerly been in its employ, the said lessee being responsible under its contract with the defendant for any recovery against the defendant. The objection was sustained, and the defendant excepted. The plaintiff was permitted to prove by one J. A. Meadows, over the defendant's objection, that he had advanced thirteen thousand dollars to the plaintiff to enable him to carry out this contract, and that the defendant still owed him seven thousand three hundred dollars on the debt. This evidence was introduced solely for the purpose of showing that the plaintiff was ready and able to perform his part of the contract. Many other exceptions were taken by the defendant to the rulings and to the charge of the court, but it is not necessary to make any special reference to them here, as they are noticed in the opinion. The issues, with the answers thereto, were as follows:

"1. Did the defendant contract with the plaintiff as alleged in the complaint? A. Yes.

"2. Did defendant fail to perform said contract on its part, as alleged in the complaint? A. Yes.

"3. What sum, if any, is the plaintiff entitled to recover of defendant on account of said alleged breach? A. \$8,106.90.

"4. Did the plaintiff carry out and perform said contract on his part? A. Yes.

"5. What sum, if any, is the defendant entitled to recover of the plaintiff on account of his failure to perform his contract, as alleged by defendant? A. Nothing."

Judgment was entered upon the verdict, and the defendant appealed.

¹³⁴ It may now be taken as settled that growing trees are a part of the realty, and a contract to sell or convey them or any interest in or concerning them must be reduced to writing. They are *fructus naturales*, and being rooted in the soil are by nature as much annexed to the freehold as any permanent fixture can be: *Scorell v. Boxall*, 1 Younge & J. 396; *Carrington v. Roots*, 2 Mees. & W. 254; *Rodwell v. Phillips*, 9 Mees. & W. 501; *Evans v. Roberts*, 5 Barn. & C. 829. The course of judicial decision in England upon this subject, from the time of the dictum of Treby, C. J., in *Anonymous*, 1 Ld. Raym. 182, to the latest period, will be found well stated in Reed on the Statute of Frauds, sections 707, 711. We have adopted the rule as given in the cases above cited, and a contract for the sale of standing timber has always been considered by us as within the meaning and intent of the statute: *Brittain v. McKay*, 23 N. C. 265; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Moring v. Ward*, 50 N. C. 272; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Green v. North Carolina R. R. Co.*, 35 Am. Dec. 738, 73 N. C. 524; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927. The question was directly presented and decided in *Drake v. Howell*, 133 N. C. 162, 45 S. E. 139, and *Hawkins v. Goldsboro Lumber Co.*, 139 N. C. 160, 51 S. E. 852. But the contract of the parties to this action was not one for the sale of standing trees, but, in the one case, for the sale and delivery of cordwood, and, in the other, for the conversion of trees growing on the defendant's land into cordwood and the delivery of the same on the defendant's right of way. It was not contemplated by the parties that there should be a transfer of any title to or interest in the trees as they stood upon the land; and this is essential to bring the agreement within the purview of the statute: 29 Am. & Eng. Ency. of Law, 2d ed., 880.

In *Washburn v. Burrows*, 1 W. H. & G. (Exch.) 115, Rolfe, B., for the court, said that where the vendor, who is the owner of the soil, sells what is growing on the land, whether natural produce (*prima vestura*), such as timber, ¹³⁵ grass, herbage or apples, or the annual fruits of industry (*fructus industriales*), as corn, pulse, or the like,

on the terms that he (the vendor) is to cut or sever them from the land and then deliver them to the purchaser, the latter acquires thereby no interest in the soil, "which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

It was ruled in the leading case of *Smith v. Surman*, 9 Barn. & C. 561, that where the owner of land agreed with another to cut timber from his own land and deliver the trees, when cut down or severed from the freehold, to the latter for a stipulated price, the statute did not apply; and the particular agreement, in that case, being construed to have the said effect in law, was therefore held not to be within the statute. And the converse of the proposition is equally true, that where one contracts with another to cut timber from his land and deliver it to him when cut or severed, the statute has no application. It has been so expressly decided: *Killmore v. Howlett*, 48 N. Y. 569; *Forbes v. Hamilton*, 2 Tyler, 356; *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771; *Green v. Armstrong*, 1 Denio, 550; *Boyce v. Washburn*, 4 Hun, 792; 2 Reed on Statute of Frauds, sec. 711. The courts properly said in the cases cited that to give the statute the construction contended for would be to destroy the right of recovery of almost every laborer at harvesting or mowing, which generally and almost universally rests on a parol contract, and, further, that it would make a writing indispensable to the validity of a contract by the owner of a peat-bed or a sand-bank to deliver even a load from it; and, we may add, it would jeopardize the rights of every woodman who for hire fells trees in the forest. The construction is utterly inadmissible.

It has been said in some cases, following a dictum of *Littledale, J.*, in *Smith v. Surman*, 9 Barn. & C., 561, that if the trees are sold by the vendor, who is the owner of the land upon which they ¹³⁶ are standing, to the vendee, with a stipulation that they must be cut and removed at once, or within a reasonable time, the trees will be regarded as chattels, and the contract will therefore not be within the statute; and this because of the shortness of the time given for cutting and removing them: *Marshall v. Green*, L. R. 1 C. P. D. 35. This distinction is scholastic, if not arbitrary. It partakes more of formalism than it does of sound logic

and cogent argument. We would not cite this class of decisions in support of our ruling in this case, as we cannot assent to the reasoning and conclusion of the courts in them. While they may seem to be in point, they really are not, as there the trees themselves, as standing timber, were sold to the vendee. Here they were not. The question as to whether the statute applies should not be determined by the mere accident that time is given to sever the trees or other growth, but by the nature of the thing, as being or not being a part of the freehold. This is the better reason and ground for decision, and it was so considered by Lord Ellenborough in *Crosby v. Wadsworth*, 6 East, 602, wherein the court held an agreement, that the plaintiff should enter the defendants' land and cut and carry away a crop of grass, to be for an interest in land, because "conferring an exclusive right to the vesture of the soil during a limited time"; and to the same effect is *Scorell v. Boxall*, 1 Younge & J. 396, and *Killmore v. Howlett*, 48 N. Y. 569, already cited by us, and numerous other cases decided by courts of high authority: 28 Am. & Eng. Ency of Law, 2d ed., 540, and note 6; 29 Am. & Eng. Ency. of Law, 889, and note 5, where the authorities are collected. At any rate, the cases which hold that as the time fixed for cutting and removal shows whether or not it was intended that the trees or other growth should receive further nutrition from the soil, it should control in the decision of the question, are at variance with the reason assigned by this court for its ruling that contracts for the sale of standing trees are within the statute. What is the law, in this respect, ¹³⁷ with regard to the fruits of industry (*fructus industriales*), is not now before us: *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588. Our opinion is therefore against what appears to be the main contention of the defendant, that the contract is void because it was not in writing; for this is a contract not for the sale of trees, but merely for the cutting of them into cordwood. It is simply a contract for employment and not for any interest in the article upon which the labor is to be bestowed. This is the practical view and accords with the intention of the parties.

The defendant is not in a position to except to the ruling of the court sustaining the objection to the juror. It had not exhausted its peremptory challenges, and, so far as

appears, the jury chosen to try the case constituted a panel entirely acceptable to both parties. The purposes of justice and ends of the law are equally attained when a fair and impartial trial has been secured to the complaining party. The right of challenge confers not a right to select, but a right only to reject. This is so in theory and it should be so in practice: *State v. Gooch*, 94 N. C. 987; *State v. Hensley*, 94 N. C. 1021; *State v. Jones*, 97 N. C. 469, 1 S. E. 680; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357; *State v. Brogden*, 111 N. C. 656, 16 S. E. 170; *State v. McDowell*, 123 N. C. 764, 31 S. E. 839. If an unobjectionable jury was secured, how does it concern the defendant that a juror was improperly rejected, if such was the case, which we need not decide? The question in the form here presented was decided against the defendant's contention in *State v. Arthur*, 13 N. C. 217.

The testimony of the witness J. A. Meadows was competent and also relevant to the issues being tried. The fact that he loaned the plaintiff money to enable him to fulfill his contract was surely some evidence bearing upon the issue as to the plaintiff's ability and readiness to perform his part of the agreement. Some of this money he had already used and a balance of seven thousand three hundred dollars still remained with which he expected to ¹³⁸complete the work. We are at a loss to know why this testimony was not relevant. The fact, if it be one, that its effect would be to make Meadows the real plaintiff, is not any legal objection to it.

The defendant objected to evidence of the conversation between plaintiff, Bryan and Carlyle, as to the delivery of the eleven hundred and forty cords, in which Bryan agreed that he need not deliver it on the right of way and ordered that it should be paid for as it then stood. This is not the declaration, after the fact, of an agent, but merely the relation of what Bryan, as chief executive officer of the defendant—that is, its president, and, too, its agent, specially deputed to make the contract and to see to its proper execution—had said and done in the course of his employment. It was a part of the very transaction involved in this dispute, and a statement made by Bryan while acting for the defendant, and *dum fervet opus*. *Smith v. North*

Carolina R. R. Co., 68 N. C. 107, and the other like cases do not therefore apply.

The defendant's counsel further contend that as the plaintiff had delivered only six hundred of the eleven hundred and forty cords on the right of way, leaving five hundred and forty undelivered, and as he had delivered only one other lot of seven hundred and forty-eight cords (exclusive of the five thousand and ninety cords), making thirteen hundred and forty-eight cords so delivered, and as the defendant paid for eleven hundred and forty cords, the plaintiff is entitled to recover only the difference, or the value of two hundred and forty-eight cords. The court charged the jury fully with reference to this matter, and told them that the value of the two hundred and forty-eight cords was the measure of the plaintiff's recovery, "if they should find the facts to be according to the defendant's contention."

The court, we think, went to the extreme limit in favor of the defendant. The defendant's prayer excluded entirely from the consideration of the jury the evidence introduced by the plaintiff to show that the defendant had waived a delivery on the right of way and that it had in several respects deliberately ¹³⁰ broken the contract. The jury have found as a fact from the evidence that there was no valid reason for refusing to receive the entire lot of wood and providing a proper place for its storage.

We were told on the argument, and it is so stated in one of the briefs, though it does not appear in the record, that after the lease was made the defendant no longer needed the wood, as the engines were changed from wood to coal burners. This, if it be true, was of course no excuse for the breach, nor does it clearly appear that there was any other good reason for refusing to receive the wood or for breaking the contract in any other respect, the former president of the defendant company having testified that the wood would have been accepted and paid for and the contract carried out if he had continued in office, and the jury having adopted the plaintiff's version of the facts. We refer to these matters to show that in submitting the case to the jury, the court has given the defendant the benefit of every possible contention in respect to them, and this is true with reference to all questions involved.

The other exceptions of the defendant are numerous, but they are not of such a nature as to require any extended discussion of them. They relate, in one form or another, to the refusal of the court to give more explicit instructions and to explain the relative rights and obligations of the parties under the contract. It has been so repeatedly held by this court, that if a party desires more definite instructions he must make a special request for them, that the citation of authority to support the rule is hardly required: *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. But it must not be inferred that we think the criticism of the charge is warranted, for we are not of that opinion. The instructions were clear and comprehensive, embracing every possible phase of the case which was material and should have been submitted to the jury. ¹⁴⁰ We do not doubt that the jury, which the parties appear to have regarded as fair and intelligent, got a perfect understanding of the facts and the law as explained by his honor.

We have discussed the exceptions chiefly relied on in the argument before us. The others are, we think, without merit. The case has been fairly and correctly tried and the defendant must abide by the result.

No error.

Contracts for the Sale of standing timber are generally regarded as within the statute of frauds, since the trees are regarded as a part of the realty: Antrion Iron Works v. Anderson, 140 Mich. 702, 112 Am. St. Rep. 434; Hodson v. Kennett, 73 N. H. 225, 111 Am. St. Rep. 607; Alabama Mineral Land Co. v. Jackson, 121 Ala. 172, 77 Am. St. Rep. 46; Hirth v. Graham, 50 Ohio St. 57, 47 Am. St. Rep. 641. It seems, however, that contracts for the sale of growing wood or timber, to be presently cut and removed from the land by the purchaser, are not construed to convey any interest in the land, but as executory agreements for the sale of timber after its severance from the soil and conversion into personalty, with a license to enter upon the land for the purpose of cutting and removing the timber. Therefore, such contracts are said not to be within the statute of frauds: See Emerson v. Shores, 95 Me. 237, 85 Am. St. Rep. 404, and cases cited in the cross-reference note thereto.

PERRY v. HACKNEY.

[142 N. C. 368, 55 S. E. 289.]

DEEDS—Effect of Alteration.—If a deed conveying land to a certain person is properly acknowledged, and subsequently the name of the grantee is stricken out and that of his wife inserted, without the knowledge or consent of the grantor, and the deed is then recorded, it is not, in its altered form, binding on the grantor, and does not transfer any title to the original grantee's wife. (p. 742.)

EJECTMENT—Pro Forma Party—Recovery on Equitable Title.—In an action of ejectment by a wife to which her husband is made a party only pro forma, with no allegation of any title in him, he is not entitled to recover on proof that he holds the equitable title. (p. 743.)

WILLS—Devises—Rule in Shelley's Case.—If a testator devises to his devisee "the use, benefit and profit" of his land during her natural life and to the lawful heirs of her body after her death, this is sufficient to pass an estate in the land, and the rule of "Shelley's Case" applies. (p. 744.)

Womack, Hayes & Bynum, for the plaintiff.

H. A. London & Son, for the defendant.

369 WALKER, J. The feme plaintiff sued to recover a tract of land, and her husband was joined with her pro forma, there being no allegation in the complaint of his title or right of possession. The sole allegation was that the wife owned the land and was entitled to the possession thereof, and the prayer was that she be declared to be the owner and that she recover the possession. It is presumed, of course, that the case was tried upon the only issue raised by the pleadings, the issue upon which it actually was tried not being set out in the record. It was admitted that Stepheness Chambless owned the land, and that he died leaving a will by which he devised it in the following terms: "I will and bequeath unto Nancy Richardson the use and benefit and profit of all my estate, real, personal and mixed, of every species and description whatever during her natural life, and to the lawful heirs of her body after her death." Nancy was his granddaughter. She died about six years ago, leaving her surviving three children, John, Hannah and Sarah. Hannah conveyed the land to J. W. Perry, one of the plaintiffs, by deed dated August 7, 1878 and sufficient in form to pass the entire estate in the premises. This deed was acknowledged by the grantor, :

afterward the name of J. W. Perry, the original grantee, was stricken out and that of his wife, M. E. Perry, inserted without the consent or knowledge of the grantor, and, in this form, it was registered. There was testimony as to the possession of the property, which need not be stated, as in the view taken of the case it has become immaterial. There was evidence that Nancy Richardson conveyed the land to Elizabeth Hackney, mother of the defendant. The plaintiff introduced the will of Stepheness Chambliss and the deed of Hannah J. Richardson in evidence. The court held that the deed did not convey any title to the feme plaintiff and, on motion, dismissed ³⁷⁰ the action, under the statute. The plaintiff excepted and appealed.

The first question raised is the sufficiency of the deed of Hannah Jane Richardson to pass title to the feme plaintiff. The deed was originally made to John W. Perry, his name was erased and that of his wife inserted in its place, and, as thus altered, it was registered. The deed, therefore, which was made to John W. Perry, has never been registered, and the deed which was registered was not the one made by Hannah Jane Richardson. A deed presupposes a contract, and, indeed, is itself an executed contract, passing the equitable title after delivery and before registration, the latter taking the place of livery of seisin to the grantee, and after registration the seisin or legal estate also passes: *Davis v. Inscoe*, 84 N. C. 396; *Hare v. Jernigan*, 76 N. C. 471; *Respass v. Jones*, 102 N. C. 5, 8 S. E. 770. The deed before registration may be redelivered or surrendered, as the cases we have already cited show, and a deed made by the grantor to a new grantee, at the request of the first grantee, if there is no fraud or other vice in the transaction. But that is not our case. A contract requires the assent of two minds to one and the same thing, and so, as to a deed, says Blackstone, for it is essential to its validity that there should be parties able and willing to contract and be contracted with for the purposes intended by the deed and a thing or subject matter to be contracted for, all of which must be expressed by the parties in their deed. It therefore follows that there must be a grantor, a grantee and a thing granted, and in every lease, a lessor, a lessee and a thing demised: 2 Blk. 295-297. Consent, which is the vital element of every contract, is wanting here. Hannah J. Richardson

³⁷¹ never agreed to be bound by a conveyance to the person whose name was inserted in the deed after its execution by her. She had an undoubted right to determine, by the exercise of her contractual right of selection, to whom she would convey the land. There is another reason why the deed to the feme is not good. A deed must always be consummated by delivery, which is the final act of execution, and this delivery must be either actually or constructively made by the grantor to the grantee. There has been no delivery by the grantor to Mrs. Perry. The only contract, so far as she is concerned, if there was any at all, was between her husband and herself, and the only delivery by him to her, and that even was not the delivery of a deed, in the sense of the law, but of a paper writing having no legal efficacy as an instrument passing title. We, therefore, hold that the deed to J. W. Perry, when altered by the insertion of his wife's name, was not binding on the grantor, and did not transfer any title to her: *Jones v. Respass*, 102 N. C. 5, 8 S. E. 770; *Hollis v. Harris*, 96 Ala. 288, 11 South. 377; *Hill v. Nesbit*, 58 Ga. 586. The deed was afterward restored to its original form by the reinsertion of the name of J. W. Perry. It may be that he could have recovered on his equitable title, if this was his suit, and he had properly pleaded and relied on his title: *Murray v. Blackedge*, 71 N. C. 492; *Condry v. Cheshire*, 88 N. C. 375; *Farmer v. Daniel*, 82 N. C. 152. But it is in fact his wife's suit, to which he is made a party only pro forma, and there is no allegation in the complaint to which proof of his equitable interest can apply. It is familiar learning that there must be allegation as well as proof, and they must correspond. There was no request for an amendment, if one could have been allowed under the circumstances, which we do not decide.

This disposes of the appeal and affirms the judgment, but the counsel have asked us to pass upon the other question as to the construction of the will of Stepheness Chambliss, in ³⁷² order to prevent further litigation. As we have a decided opinion upon that matter, we will do so, for it may enable the parties to adjust their differences.

The appellant contends that only a life estate was given to Nancy Richardson by the will, as the land was not devised, but merely its "use, benefit and profit," and for this reason the rule in *Shelley's Case* does not apply. We think

the words are sufficient to pass the estate in the land and that the rule does apply. The words "all my rents" were held sufficient to pass real estate; for it was said to be according to the common phrase and usual manner of some men, who name their lands by their rents: 3 Gr. Cruise, 2d ed., p. 229 (7 Cruise, 176). So a devise of the "rents, issues and income" of lands was held to pass the land itself: *Anderson v. Greble*, 1 Ashm. 136. A person having let several houses and lands for years, rendering several rents, devised as follows: "As concerning the disposition of all my lands and tenements, I bequeath the rents of D. to my wife for life, remainder over in tail." The question being whether, by this devise, the reversions passed with the rents of the lands, it was resolved that they did, as that was clearly the intention, and the will should be construed according to the intent to be gathered from its words: *Kerry v. Derrick*, Cro. Jac. 104; *Allan v. Backhouse*, 2 Ves. & B. 74. A devise of the income of land was held to be in effect a devise of the land (*Reed v. Reed*, 9 Mass. 372); so a devise of the "rents, profits and residue" of the testator's estate received a like construction: *Den v. Drew*, 14 N. J. L. 68. In *Parker v. Plummer*, Cro. Eliz. 190, a devise in the following words: "I will that my wife shall have half the issues and profits of the land during her life," the question being whether she had any interest in the premises or was only entitled to have an account of rents. It was determined that she had an estate, "for to have the issues and profits and the land were all one," and the same was held with respect to a devise of a "moiety ³⁷³ of the rents, issues and profits of my estate," the words being equivalent to a devise of the estate in fee: *Stewart v. Garnett*, 3 Sim. 398. See, also, *Beekman v. Hudson*, 20 Wend. 53; *Cook v. Gerrard*, 1 Saund. 186c; *Whitome v. Lamb*, 12 Mees. & W. 813; *Mannox v. Greener*, L. R. 14 Eq. 456. The language of this will is much stronger to show an intention to devise the land itself than was that used in any of the cases cited. It appears that he gave to the heirs of her body precisely the same interest that he gave to the life tenant. If he intended that they should have the corpus, why should not the mother also have it, by the same construction of his words? The law searches for the intention of the testator and executes it when discovered, without any special regard to the particular manner of expressing

it, testators generally being inops consilii. In this case, there is no reference to the corpus, either in the first or second limitation, but each, as to the subject of the devise, is couched in the same terms. No trustee is appointed to hold the legal title, and it cannot be supposed that the testator intended the legal title to remain in his heirs forever for the "use, benefit and profit" of those named in the will. Those words are appropriate in law, as the authorities show, to create a beneficial interest in the land, and show clearly an intention to do so. There is no apparent reason for keeping the legal and beneficial interest apart, and we must presume that they were intended to go together to the object of the testator's bounty. But if the testator ever withheld the legal estate and it descended to his heirs, he used words fit, and sufficient in law, to raise a use in favor of his granddaughter, Nancy Richardson. Why did not the statute execute the use by drawing the legal title to it and thus unite the two estates, so as to form what is called in Fleta the only perfect title (*Fit juris et seignae conjunctio*)? 2 Blk. 311.

Not only does the very language of the will, when considered in its ordinary sense, clearly indicate a purpose to give ³⁷⁴ both the legal and beneficial interest to the devisee, but the inference thus drawn from it is in accordance with the interpretation of the law. "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction, to find out the intention of the testator, which intention ought to prevail if agreeable to the rules of law": *Goodlittle v. Whitby*, 1 Burr. 233. We think those rules, as well as the proper understanding of the words used, justify our construction of the will. The law carries into effect the intention of the testator, if sufficiently expressed, however defective the language may be. This is one of the rules of construction. The case of *Floyd v. Thompson*, 20 N. C. 616 (4 Dev. & B. 478), seems to be directly in point, as the language is substantially identical with that of the devise in question. There the property was limited to the use and benefit "of the legatees for life, and then to 'descend' to the heirs of their body," and the words were held to denote that the heirs took in succession from and not merely after the first taker. Ruffin, C. J., added: "If the subject here had been land, the daughter, first taker, would undoubtedly have the fee.

and we think less than the entire property in the slaves will not satisfy the words." To the same effect are *Donnell v. Mateer's Exrs.*, 40 N. C. 7; *Worrell v. Vinson*, 50 N. C. 91; *King v. Utley*, 85 N. C. 59; *Ham v. Ham*, 21 N. C. 598. In the case last cited the subject is fully discussed and the authorities collated by Daniel, J. The conclusion is, therefore, irresistible, that the testator used the words "use, benefit and profit" as synonymous with the land itself: 3 Gr. Cruise, 229; 2 Underhill on Wills, sec. 692.

Having settled this point, it is not difficult to decide that the rule in *Shelley's Case* applies to the limitation. It is within the very words of the rule, for where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately ³⁷⁵ or immediately to his heirs, in fee or in tail, always, in such case "the heirs" are words of limitation of the estate, and not words of purchase; and superadded words of limitation, not varying the course of descent, do not prevent the application of the rule: *Shelley's Case*, 1 Coke, 104. The rule applies only where the same persons will take the same estate, whether they take by descent or purchase, in which case they are considered to take by descent: *Ward v. Jones*, 40 N. C. 400; *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721. They who take in remainder, must take in the quality of heirs according to the course of descent established by law. The rule is one of law, and not merely one of construction for the purpose of ascertaining the intention, and when the words of the limitation bring the case within the rule, it applies, regardless of the intent, or, if expressed differently, the intention is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning: *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657; *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444; *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450; *Pitchford v. Limor*, 139 N. C. 13, 51 S. E. 789. Under the devise in this will, the limitation over carries the estate to the same parties, whether they take by descent or by purchase, and the words "heirs of the body" are therefore words of limitation, and not words of purchase, as those so designated are presumed to take by descent in the quality of heirs: *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Mills v. Thorne*, 95 N.

C. 362. It follows that Nancy Richardson acquired a fee simple under the devise. If she conveyed to Mrs. Hackney, her daughter, Hannah J. Richardson, got nothing by descent, and her deed to J. W. Perry consequently passed nothing to him. She had nothing to grant. But if she had not parted with her title and died intestate, her three children took from her by descent, as tenants in common. We do not know what are the facts, as they were not found, the case having been taken from the jury. There is no error in the ruling of the court.

No error.

As to the Effect of Altering a Deed by a substitution of grantees after delivery, see *Abbott v. Abbott*, 189 Ill. 488, 82 Am. St. Rep. 470; note to *Burgess v. Blake*, 86 Am. St. Rep. 88. A deed, so far as it has operated as a conveyance, is usually not avoided by alteration: *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22.

LEVIN v. GLADSTEIN.

[142 N. C. 482, 55 S. E. 371.]

JUDGMENT OF ANOTHER STATE—Fraud as Defense—Equitable Defense.—Although a judgment when sued upon in another state cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment. (p. 751.)

JUDGMENTS OF ANOTHER STATE will be given the same faith and credit which is given domestic judgments. (p. 754.)

JUDGMENTS OF OTHER STATES—Fraud as Defense—Justice's Jurisdiction.—In an action upon a judgment of a sister state the defendant may interpose the defense in the justice's court, that the judgment was obtained by fraud practiced upon him. (pp. 757, 758.)

Biggs & Reade, for the plaintiff.

Winston & Bryant, for the defendant.

⁴⁸² CONNOR, J. This was a suit upon a judgment obtained in the superior court of Baltimore City, Maryland. Personal service was had upon defendant while in Baltimore. Action was instituted ⁴⁸³ upon said judgment before

a justice of the peace of Durham county, and from a judgment therein, defendant appealed to the superior court.

At the beginning of the trial in the superior court counsel for defendant stated he admitted the regularity of the judgment sued upon and withdrew all pleas and defenses to said action, save and except that the judgment upon which the action was brought was procured by a fraud practiced by plaintiffs upon the defendant, and that he insisted upon that plea alone. Thereupon the plaintiffs moved for judgment for that the judgment rendered by the court of Maryland was not open to attack in this action for fraud. Motion overruled, and plaintiffs excepted.

His honor held that the burden of proof was upon the defendant, and he proceeded to introduce testimony. Mr. Gladstein testified that he was the defendant in the case; that he knew Philip Levin and Simon Levin, and had bought goods of them. That some time prior to his going to Baltimore he bought a bill of goods of plaintiffs, but had shipped some of them back to Baltimore because they were not up to the sample. That plaintiffs had refused to take the goods out of the depot in Baltimore. That upon his visit to Baltimore summons was served upon him in the action brought there by plaintiffs; but after said summons was served upon him, and before the return day, he saw one of the plaintiffs and had an interview with him at the store of L. Singer & Son, during which interview plaintiffs agreed with him to withdraw said suit and return the goods to him at Durham, provided he would, upon their receipt, pay the plaintiffs a sum of money which they agreed upon, to wit, one hundred and thirty-three dollars, and freight and storage not to exceed three dollars. That relying upon this agreement he returned to Durham and made no defense to the action. Plaintiffs never returned the goods to him at Durham. That the first time he knew of the judgment was when called upon by attorneys for plaintiffs to pay said judgment.

⁴⁸⁴ There was testimony contradicting defendant. After hearing testimony from both parties, the court submitted the following issue to the jury: "Was the alleged judgment rendered for one hundred and forty-three dollars, bearing date April 27, 1904, in the superior court of Baltimore City, in favor of Philip Levin and Simon Levin, copartners,

trading as P. Levin & Co., against M. Gladstein, obtained by the fraud of plaintiffs?" To which the jury responded "Yes." Judgment was thereupon rendered that the plaintiffs take nothing by their action, and that the defendant go without day, etc. Plaintiffs excepted and appealed.

Two questions are presented upon the plaintiff's appeal: 1. Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? 2. If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the constitution of the United States, article 4, section 1, that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," earnestly contend that the defense is not open to the courts of this state. That the remedy for the fraud in procuring the judgment, if any, must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one state based upon a judgment obtained in a sister state."

When a judgment rendered by the court of one state becomes the cause of action in the court of another state, ⁴⁸⁵ and the transcript made in such state, duly certified, as prescribed by the act of Congress, is produced, it imports verity and can be attacked for only one purpose: The defendant may deny that the court had jurisdiction of his person or of the subject matter, and for this purpose may attack the recitals in the record: Bailey on Jurisdiction, secs. 198, 199. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of nil debit. This was held in *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411, and has been uniformly followed by both state and federal courts: 2 Am. Lead. Cas. 538.

In *Christmas v. Russell*, 72 U. S. 290, 18 L. ed. 475, Mr. Justice Clifford said: "Substance of the second objection of the present defendant to the fourth plea is that, inasmuch as the judgment is conclusive between the parties, in the state where it was rendered, it is equally so in every other

court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee*, 7 Cranch, 481, 3 Ld. ed. 411, was whether nil debit was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the state court from whence it was taken, and that nil debit was not a good plea to such an action." The learned justice proceeds to say: "Domestic judgment, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial, or by bill in chancery."

It will be found, upon careful examination of *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29 L. ed. 535, 59 Md. 239, 43 Am. Rep. 554, that the question under consideration here was not involved. It is true that, ⁴⁸⁶ in the discussion, Mr. Justice Gray uses the language cited by counsel, which excludes the right of the defendant to impeach the judgment "for fraud in obtaining it." So, in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, Chief Justice Fuller, after quoting the language of the constitution, says: "This does not prevent an inquiry into the jurisdiction of the court, in which judgment is rendered, to pronounce the judgment, nor into the right of the state to exercise authority over the parties or the subject matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their admitted territory." The learned chief justice relies upon the same line of cases cited by Judge Gray. Neither of them was discussing the question here presented, nor was it presented by the record in those cases.

The case of *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, was cited in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, and, as we shall see later, was approved. In *Maxwell v. Stewart*, 89 U. S. 77, 22 L. ed. 564, the court simply reiterated the doctrine announced in

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411, that the plea of nil debit could not be interposed in an action upon a judgment: Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 188; Bailey on Jurisdiction, 191, 192. This court in Miller v. Leach, 95 N. C. 229, by Ashe, J., said that the judgment of a sister state was put by the constitution upon the same footing as domestic judgments, precluding all inquiry into the merits of the subject matter, "but leaving the questions of jurisdiction, fraud in the procurement, and whether the parties were properly before the court, open to objection," citing Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411. See also, Coleman v. Howell, 131 N. C. 125, 42 S. E. 455. It is elementary learning that this plea was not proper in actions founded upon a specialty or a record: Shipman's Common Law Pleading, 196. But if plaintiff, in an action on a record, instead of demurring to the plea, ⁴⁸⁷ accepts it and joins issue, the defendant is at liberty to prove any and every special matter of defense which might be proved under the same plea in debt. For the plaintiff, by accepting the plea, founds his demand solely upon the defendant being indebted, and thus waives the estoppel, or conclusive evidence of the fact, etc.: Overman v. Clemmons, 19 N. C. 185; Gould's Pleading, 287. Hence, we find that in all of the cases in which the plea of nil debit was entered, the defendant demurred, and the decision was on the demurrer, which was uniformly sustained: Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; Maxwell v. Stewart, 89 U. S. 77, 22 L. ed. 564; Benton v. Burgot, 25 Pa. 240; Carter v. Wilson, 18 N. C. 362; Knight v. Wall, 19 N. C. 125. In Allison v. Chapman, 19 Fed. 488, Nixon, J., says: "The subject is fully discussed, . . . and the conclusion is reached that the allegation, in a plea, that a judgment was procured through fraud, is not a good common-law defense to a suit brought upon it in the same or a sister state." This conclusion is fully supported by all of the authorities, and in this we concur with the learned counsel for the plaintiff. Notwithstanding the well-settled rule that the judgment when sued upon in another state cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.

Pearce v. Olney, 20 Conn. 544, was "a bill in chancery praying for an injunction against the further prosecution of an action at law." Defendant sued plaintiff in the superior court of New York City and obtained service upon him. Plaintiff saw and made an arrangement with defendant's attorney by which it was agreed that no further action would be taken in the case until plaintiff should receive further notice from him. Relying upon said agreement, plaintiff did not employ any counsel and did not appear before said court, ⁴⁸⁸ believing that said suit was to be no further prosecuted against him. Defendant, in violation of said agreement, procured judgment against plaintiff. Defendant, some time thereafter brought suit in the court having jurisdiction in Connecticut, and at the time of filing the bill said suit was pending in said court. Defendant relied upon the constitutional provision, insisting that to enjoin him from prosecuting his action on the judgment would be to deny "full faith and credit to the judicial proceeding" in New York. The court said: "It is insisted that under the constitution of the United States . . . it is not competent for the court to impeach the judgment of the superior court of New York; it being shown that the court had jurisdiction of the cause, by the regular service of process on the defendant in that suit. And cases are cited to sustain this position. This doctrine is correct enough, no doubt, properly understood and applied; but it has no application here. There is no attempt to impeach the validity of the New York judgment. In granting an injunction against proceedings at law, whether in a foreign or domestic court, there is no difference; the court of equity does not presume to direct or control the court of law; but it considers the equities between the parties and restrains him from prosecuting an action." A perpetual injunction was granted. The case had a further history. The defendant in the equity suit and plaintiff in the judgment assigned the judgment to one Dobson, who brought suit on it in the superior court of New York against Pearce, the defendant in the judgment. Defendant set up by way of defense the record of the equity suit in Connecticut and the injunction granted therein. Dobson sought to avoid the injunction. The cause was ably argued and carefully considered by the court. It was said: "So' fraud and imposition invalidate a judgment as they do all acts; and it is not without

semblance of authority that it has been suggested that, at law, the fraud may be alleged whenever the party seeks to ⁴⁸⁹ avail himself of the results of his own fraudulent conduct by setting up the judgment, fruits of his fraud. But whether this is so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud." The court proceeded to say that under the judiciary system in New York, permitting equitable defenses to be set up in the answer, whether the fraud could have been pleaded or not in an action at law, it could be set up as an equitable defense to defeat a recovery upon a fraudulent judgment. The court held that the injunction granted in Connecticut established the fraud, and that plaintiffs could not recover. As we have seen, this case was cited with approval in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538. It is cited with approval by the chancellor in *Davis v. Headley*, 22 N. J. Eq. 115, in which it is said: "That the courts of equity will set aside judgments of their own and other states for fraud practiced in procuring them. . . . It will not lend its aid to enforce a judgment obtained by fraud, when the fraud is shown. Complainant must come with clean hands in the matter on which relief is sought." The doctrine is well stated in *Payne v. O'Shea*, 84 Mo. 129 (cited in *Black on Judgments*, sec. 919): "A proceeding in the nature of a bill in equity will lie to enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other states, when sued on in this state. The fraud, however, for which a judgment will be enjoined must be in the procurement of the judgment." Nor does the constitutional provision stand in the way of such proceeding. Usually, the power of a court of equity to interfere in the enforcement of judgments obtained by fraud is invoked to restrain the plaintiff, in such judgments, from issuing or enforcing execution. The theory was, as we have seen, that the court of equity did not call into question the integrity of the judgment, but by its decree operated in personam upon the plaintiff, enforcing the decree ⁴⁹⁰ by punishing for contempt disobedience to it. But when the judgment, as in *Pearce v. Olney*, 20 Conn. 544, was made the cause of action at law, equity enjoined the plaintiff, shown to be guilty of the fraud, from

prosecuting the action. Our equity reports contain many illustrations of the practice: *Hadley v. Roundtree*, 59 N. C. 107.

The underlying principle is that the judgment of a sister state will be given the same faith and credit which is given domestic judgments. It is contended, however, and with force, that the "faith and credit" to be given such judgment is measured by the law of the state in which it is rendered.

We find upon examining the decisions made by the Maryland court that in that state a court of equity will enjoin the enforcement of a judgment obtained by fraud. We had no doubt that such was the law in that state. In *Little v. Price*, 1 Md. Ch. 182, the chancellor says: "The object of an injunction to stay proceedings at law, either before or after judgment, is to prevent the party against whom it issues from availing himself of an unfair advantage resulting from accident, mistake, fraud or otherwise, and which would, therefore, be against conscience. In such cases the court will interfere and restrain him from using the advantage which he has improperly gained": Citing *Story's Equity*, sec. 885 et seq. In *Wagner v. Shank*, 59 Md. 313, it appears that when the complainants were summoned in the original actions, they employed counsel to defend them. The counsel saw plaintiff in the actions, and he concluded to dismiss the cases and executed an agreement to do so. Counsel notified his clients of the agreement and "they supposed the matter was finally disposed of and gave themselves no further concern about it." The plaintiff, without notice to counsel or parties, had the magistrate to enter judgments in eleven hundred and ninety-six cases, amounting to one hundred and twenty-seven thousand eight hundred and thirty-six dollars, and two thousand three hundred and eighty-six dollars cost. Miller, J., after reciting the facts, says: "These facts alone make a plain case for relief ⁴⁹¹ in equity. . . . As to the jurisdiction of a court of equity to pass decrees appealed from, we entertain no doubt. There are prayers in most of these bills, not only that these judgments may be perpetually enjoined, but that they may be canceled." After citing authorities sustaining the right of complainant to have the relief prayed, he concludes: "And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice." Concluding a very able opinion, he says: "The strong arm of a court of equity has protected the complainants, and the de-

crees in their favor will be affirmed." It is thus apparent that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the courts of this state, and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that state. Mr. Bailey, in his work on Jurisdiction, 202, 203, notes the language of Judge Gray in *Christmas v. Russell*, 72 U. S. 290, 18 L. ed. 475, and Chief Justice Fuller in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, saying: "However it should be conceded that whatever may have been the rule in the court prior to the decision in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, that the rule there stated must be taken as the present doctrine of that court." He notes the diversity in the several states, saying that in Maryland the court has not followed the rule in *Cunningham's* case, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, citing *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121. In that case the question was whether in that state the judgment rendered in Virginia could be collaterally attacked for fraud. That is not the question here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud; and, as we have seen, it may be. We are not seeking to know what the courts of Maryland would permit to be done if a North Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon and attacked for fraud.

⁴⁹² The plaintiff says, however this may be, the defendant can have this relief only in Maryland; that he must go into that state and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that in bringing an action in another state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a

domestic judgment, it is equally available and equally efficient in actions on judgments of other states. . . . It is true that two of the decisions of the supreme court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment (citing *Christmas v. Russell*, 72 U. S. 290, 18 L. ed. 475, and *Maxwell v. Stewart*, 89 U. S. 77, 22 L. ed. 564). We apprehend, however, that these decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law": *Freeman on Judgments*, sec. 576. If those states, in which equitable remedies were administered only by courts of equity, enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court, and one form of action, the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by the case of *Gray v. Richmond Bicycle Co.*, 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663. The action was brought on a note which the court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured ⁴⁹³ by fraud. Vann, J., said that it was admitted that "even a foreign judgment may be successfully assailed for fraud in its procurement. . . . It was not necessary to go into the state of Indiana to obtain relief from the judgment through its courts, for, as we have held, a court from one state may, when it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject matter is situated in such other state. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly, and it was the duty of the trial court to send the case to the jury with the instruction that if they found the judgment was procured by fraud, it could not be asserted as a bar in this state": *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449. The same rule is laid down by Black. In some of the states, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant

is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now, when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense. For if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the constitution does not require: *Black on Judgments*, sec. 918. That the defense made by defendant may, under our code, be set up by way of answer, is well settled. The cases in point are collected in *Clark's Code*, third edition, page 238.

The remaining question is whether the defense is available to defendant in a justice's court. It is said that the remedy of defendant being an injunction against proceeding with the action, resort must be had to the superior court having ⁴⁰⁴ equitable jurisdiction. The question is not free from difficulty. It would seem, however, that in view of the frequent decisions of this court that while a justice's court has no jurisdiction to administer or enforce an equitable cause of action, a defendant may interpose an equitable defense in that court, his honor correctly submitted the issue raised by the defense. In *Lutz v. Thompson*, 87 N. C. 334, the defendants sought to prevent a recovery upon a bond by showing that it had been executed in accordance with certain agreements, and that by reason thereof it would be inequitable to enforce one part of it and leave the other part unfulfilled. The objection was made that this defense, being equitable in its character, could not be interposed in a justice's court. *Ruffin, J.*, said: "Whenever such a court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination. And though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense."

In *McAdoo v. Callum*, 86 N. C. 419, originating in a justice's court for the purpose of ousting defendants, tenants of the plaintiff, the defendants set up by way of defense a contract for a renewal of the lease, etc. To the objection that the justice had no jurisdiction to hear such defense, *Smith, C. J.*, said: "While this provision is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically

enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejectment of the defendants": *Hurst v. Everett*, 91 N. C. 399. We can see no good reason why the defendant may not set up, by way of defense, the facts which show that the judgment, plaintiff's cause of action, was obtained by fraud practiced upon him: *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768. These and other cases in ⁴⁹⁵ our reports illustrate the rule of practice, that equitable defenses may be set up in the court of a justice of the peace.

In *Earp v. Minton*, 138 N. C. 202, 50 S. E. 624, the suit was not upon a judgment, but the judgment, in an action between the plaintiff and another party, one Cranor, was offered in evidence to sustain plaintiff's title. The judgment when so offered could not be attacked collaterally, as shown both upon reason and the authorities cited. In our case, the defendant, if in the superior court, would have pleaded the fraud in bar of plaintiff's recovery, just as if the suit had been upon a bond under seal obtained by fraud. We can see no good reason why he may not, for the same purpose, set it up in the justice's court. It would be incompatible with our conception of remedial justice under the code system, to require the defendant to submit to a judgment and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the constitution and the adoption of the code practice. We but follow the line marked by *Ruffin, J.*, when he announced the general principle in *Lutz v. Thompson*, 87 N. C. 334.

We find no error in the ruling of his honor in regard to the burden of proof or probative force of the testimony required to establish the defense.

We have examined the authorities cited by plaintiffs' counsel, and, while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority and those best sustained by reason.

There is no error.

Judgments of Courts of Other States are considered in the note to *Montgomery v. Consolidated etc. Co.*, 103 Am. St. Rep. 304. Want of jurisdiction may be shown by extrinsic evidence, even against

the recital of a judgment record of a sister state: *Ingram v. Ingram*, 143 Ala. 129, 111 Am. St. Rep. 31, and cases cited in the cross-reference note thereto. But a plea of fraud is not admissible in actions, on judgments of sister states, when there was jurisdiction of the person and subject matter, unless it can be set up in the court of the state rendering the judgment: *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202; *Forrest v. Fey*, 109 Am. St. Rep. 249.

STATE v. RING.

[142 N. C. 596, 55 S. E. 194.]

SEDUCTION Under Promise of Marriage—Sufficiency of Evidence.—In a criminal prosecution for seduction under promise of marriage, it is not necessary to show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces, and it is sufficient if the jury, under the evidence, can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt. (pp. 759, 760.)

SEDUCTION Under Promise of Marriage is Accomplished when the prosecutrix trusted to the defendant's promise that he would never forsake her and to his promise of marriage when she yielded to his embraces to her ruin; the fact that the promise to marry existed long before the seduction can make no difference if he afterward took advantage of it to effect his purpose. (p. 761.)

R. D. Gilmer, attorney general, and W. Clark, Jr., for the state.

D. J. Lewis and J. B. Schulken, for the defendant.

599 **WALKER, J.** The defendant's counsel, in their brief, contend that there was no evidence in the case that the prosecutrix was seduced under a promise of marriage. The gravamen of this offense is seduction, induced by the promise which the defendant has failed to keep. There are other essential elements, but this is the principal one, and if there was no evidence of it, the defendant should have been acquitted. We think that there was not only some, but abundant, evidence to warrant the verdict of the jury. It is not necessary to a conviction under this law that the state should show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces. It is quite sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the prom-

ise, giving to the defendant the benefit of any reasonable doubt.

But in this case the defendant admits in one of his letters to the prosecutrix that she had trusted in his honor, and that he was deeply sensible of the great wrong that he had done her, and that she had sacrificed her virtue at his solicitation when they were engaged to be married. While under a promise of marriage to her, he told her that he would not believe that she loved him if she did not comply with his request, and she yielded to prove her love for him. Just before she did so he promised never to forsake her, and boldly and shamelessly asserted that he did not ask her consent as a favor, but as something to which he was of right entitled by reason of their engagement. Is it possible for evidence to be stronger for the purpose of showing a seduction accomplished by a promise of marriage? The mere fact that the promise existed long before the seduction can make no difference, if he afterward took advantage of it in order to effect his nefarious purpose. His conduct, in such a case, would be the more reprehensible as showing a studied and deliberate purpose, first to engage her affections and then by taking advantage of her weak and confiding nature and the ^{too} trustfulness he had inspired by his perfidy to insidiously ensnare her with his wicked and faithless promises of love and constancy. Such base conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue. If he made his promise to her in good faith, why did he not keep it when he found that he had ruined her and when she most needed the protection of his name? It being admitted that he made the promise, his gross betrayal of her was surely a fact to be considered by the jury in determining his guilt. It is against the wily arts of the seducer that the law would protect the innocent woman, and he can effect his purpose just as well by first gaining the confidence and affection of his intended victim and then inducing her to surrender her chastity and finally debauching her by means of persistent appeals to her supposed sense of duty and obligation to him as her lover.

The evidence in the case forces the conviction upon us that this unfortunate woman trusted to his pledge that he would

never forsake her, and to his promise of marriage, when in an evil moment she permitted him to accomplish her ruin.

The defendant's counsel relied on *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574, and quotes this passage from the opinion of the court by Justice Davis: "If she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a promise of marriage, she is in *pari delicto*, and there is no crime committed under the statute." That is very true. But the principle there stated does not fit the facts of this case. If the evidence is trustworthy, there is hardly anything in it to indicate that she sacrificed her chastity in order to gratify her own lascivious desires. At least, the jury could well have found that she did not do so, but, on the contrary, that in the trustful and abiding belief that the defendant would not betray her, but fulfill his promise of marriage, she yielded at last to his urgent appeals. ⁶⁰¹ The case is rather to be governed by another principle stated in that case: "The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage," in return.

The case of *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238, is authority for the position that the state is not required to show that the defendant, in so many words, promised to marry the woman if she would agree to submit to carnal intercourse with him, or, in other words, to show the causal relation between the promise of marriage and the seduction by any set form of words; but it is sufficient if the evidence is such as to convince the jury to the exclusion of all reasonable doubt that the woman was influenced by the promise and the man intended that she should be, or so purposely acted as to produce the impression on her mind that he would keep his promise if she would comply with his request. The jury are to draw their own deduction from the testimony, provided there is even inferentially any evidence of a purpose to violate the statute. Besides all this, what the defendant said in his letters is, of course, evidence against him as to what his purpose or intention was and as to what he actually said and did. "I am deeply sensible of the great wrong that I have done. Don't be deceived, and be sure that you know your friends. Have as little to say about it as

possible. You have trusted to my honor in the past. While this is a very unfortunate affair, it is no worse than others have done." These expressions, taken from the evidence, are much stronger in their tendency to establish the guilt of the defendant, or his vicious purpose throughout his intimate association with the prosecutrix, than were the words used by the defendant in his conversation with the woman's father, which were held to be sufficient to sustain the verdict in the Horton case (100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238).

We can see no error in the ruling of the court.

Seduction is discussed at length in the note to *Bradshaw v. Jones*, 76 Am. St. Rep. 659. The necessity of a promise to marry, and the sufficiency thereof, in order that seduction may constitute a crime, are considered at page 672 of this note, and also in the note to *State v. Carron*, 87 Am. Dec. 408.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

INSURANCE CO. OF TENNESSEE v. WALLER.

[116 Tenn. 1, 95 S. W. 11.]

TRUST IN PAROL.—A valid express trust involving real estate, enforceable in equity, can be created by parol. (p. 766.)

TRUST, When Created.—If a conveyance is executed, accompanied by a parol agreement that the grantee will hold the property for the use of the grantor and convey the title as he may direct, no consideration being paid for the conveyance to him, a valid parol trust is thereby created in favor of the grantor, enforceable in equity, though his object in making the conveyance and executing the agreement was to hinder, delay and defraud his creditors. (p. 766.)

STATUTE OF FRAUDS, Parol Agreement When not Within.—A preliminary parol agreement made at the execution and delivery of a conveyance of real property that the vendee will hold it in trust for a certain person is not within the statute of frauds. (p. 767.)

CONVEYANCE, Failure to Name a Grantee Therein.—The fact that the name of the grantor does not appear in a conveyance is not a fatal defect, if, from the whole instrument, it sufficiently appears to be his contract and deed and clearly expresses his intention to convey the property, and the omission of the pronoun "I" therefrom is evidently a clerical error which is supplied by the context and subsequent recitals of the deed. (p. 767.)

TRUSTEE, Married Woman as.—By the common law, a married woman had the capacity to take and hold lands as trustee and to execute the powers and duties of the trust, including that of conveying the trust property by deed without the concurrence and joinder of her husband. (pp. 769, 773.)

A CONVEYANCE by a Married Woman Without the Signature of Her Husband is valid if she holds the property as a trustee and the conveyance is to carry out the trust. (pp. 769, 773.)

TRUST.—A Married Woman may be a Trustee for Her Husband and may execute the trust by conveying the property to him by a conveyance in which he does not join. (pp. 771, 773.)

CONVEYANCE in Fraud of Creditors, Effect of Reconveyance to the Grantor.—If property is conveyed for the purpose of defrauding creditors, and the grantee agrees by parol to hold it for the

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use of the grantor and to convey it as he may direct, though the trust may not be enforced, yet if the grantee respects it and makes a reconveyance as agreed upon, the legal and equitable titles become reunited, and the previous fraud will not bar the grantor from recovering upon any contract relating to such property for trespass upon it or upon a contract of insurance effected thereon by him. (p. 773.)

J. W. Bonner and C. C. Mooney, for Insurance Company.

J. S. Pilcher, for Waller.

⁴ SHIELDS, J. This action was brought by R. W. Waller, in the circuit court of Davidson county, to recover upon a policy of fire insurance issued to him October 8, 1901, for one thousand dollars, upon certain property situated in the city of Nashville. The policy contains a stipulation that it shall be void "if the interest of the insured be other than unconditional sole owner of it; or if the subject of the insurance be a building on ground not owned by the insured in fee simple." The defendant pleaded the general issue of not guilty, and special pleas, averring that the plaintiff was not the unconditional and sole owner of the property, and that he was not siesed in fee of the ground upon which the buildings destroyed were situated. The issues joined were submitted to a jury, and there was verdict and judgment in favor of the plaintiff, Waller. The insurance company brings the case to this court, and assigns as error, among other things, that there is no evidence to sustain the verdict. This contention is based upon the assumption that there is no evidence in the record to show that the plaintiff, at the time that the property was insured and destroyed, was the unconditional and sole owner of it, and none that he ⁵ owned in fee simple the ground upon which the buildings insured and destroyed stood.

The facts in relation to the title of the property insured and destroyed, and the ground upon which it stood, are these: R. W. Waller, the plaintiff, owning the lots in question in fee simple, on March 13, 1894, for the purpose of hindering, delaying and defrauding his creditors, conveyed them by deed, with full covenants of warranty, for a recited consideration of three thousand dollars, to his kinsman, W. H. Hyde, with a contemporaneous parol agreement and understanding that the latter should hold them for his use, and convey the title as he should direct. No consideration was in fact paid.

W. H. Hyde, being about to marry, and Waller fearing some complication, procured him to convey the property by deed, absolute upon its face, with full covenants of warranty, to Mrs. Madora Waller, wife of R. W. Waller, for a recited consideration of three thousand five hundred dollars in hand paid, she agreeing at the time to hold it in all respects as it was held by Hyde. No consideration was paid by Mrs. Waller.

Afterward, December 7, 1898, Mrs. Madora Waller, for a recited consideration of five dollars, but in fact without any other than her agreement to hold the property for the use of her husband and convey it as he should direct, undertook to reconvey it to him by an instrument in these words:

"For and in consideration of the sum of \$5.00, and other good and sufficient consideration, have bargained * and sold by these present do transfer and convey unto the R. W. Waller, his heirs and assigns, a certain tract or parcel of land in Davidson county, State of Tennessee, as follows: Lots Nos. 3 and 4 in John Lunsden's 3rd addition, as per plan in book 57, page 106, of the R. O. D. C. Said lots front 150 feet on the south side of Mill street, and run back between parallel lines 135 feet to an alley. To have and to hold the said tract or parcel of land, with the appurtenances, estate, title, and interest thereto belonging, to the said R. W. Waller, his heirs and assigns forever. And I do covenant with the said R. W. Waller that I am lawfully seized and possessed of said lands in fee simple, have a good right to convey it, and the same is unincumbered. And I do further covenant and bind myself, my heirs and representatives, to forever warrant and defend the title to said lands against the lawful claims of all persons whomsoever.

"Witness my hand, this 14th day of September, 1898.

"(Signed) MADORA WALLER."

An acknowledgment and privy examination appear to this deed in these words:

"State of Tennessee,
Davidson County.

"Personally appeared before me, W. F. Davis, a notary public in and for said county and State, the within named bargainor, Mrs. Madora Waller, with whom I am personally acquainted, and who acknowledged that she executed the

within instrument for the purposes therein contained. And Mrs. Madora Waller, wife of the said R. W. Waller, having personally appeared before me privately and apart from her husband, the ⁷ said Mrs. Madora Waller acknowledged the execution of said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or restraint from her said husband, and for the purpose therein expressed.

"Witness my hand and official seal at Nashville, Tennessee, this 7th day of December, 1898.

"W. F. DAVIS,
"Notary Public."

The contention of R. W. Waller, upon these facts, is that a parol trust was created in his favor by the agreement of W. H. Hyde and Mrs. Madora Waller, respectively, when the conveyances were made to them, to hold the property for him and subject to his direction, valid and enforceable, and that the instrument above set out, executed and acknowledged by Mrs. Waller was a valid execution of the trust and re-vested him with the absolute and unconditional fee simple title to the property; that if the instrument executed by Mrs. Waller was for any reason inefficient to re-vest the title of the property in him, then she held it in trust for him, and in equity could be compelled to convey it to him, and that such equitable title filled the requirements of the policy as to ownership and title.

While that of the insurance company is that the parol trust created in favor of R. W. Waller is within the statute of frauds and perjuries, and void; that if it were valid it is unexecuted, the deed signed by Mrs. Waller being void, because her name does not appear in the body and operative part of it, and her husband did not join in its execution; and unenforceable because made for the purpose ^s of defrauding the creditors of R. W. Waller, and consequently there is a total failure to prove a title of any kind.

We are of the opinion that a valid express trust, involving real estate, enforceable in equity, can be created by parol, and that, other questions out of the way, such a trust was created by the agreements made by W. H. Hyde and Mrs. Madora Waller, at the time the property in question was conveyed to them respectively, that they held it in trust for R. W. Waller, to be conveyed upon his request as he should direct.

It is now well-settled law in Tennessee that a contemporaneous parol agreement, made at the time of the execution and delivery of a conveyance of real estate, absolute upon its face, that the vendee will hold the property conveyed in trust for a certain person, is not within the statute of frauds, and aside from the rights of creditors of the original vendor and innocent purchasers from the vendee vests in the beneficiary of the trust a valid equitable title to the property conveyed, which a court of equity will enforce. We need only refer to the recent cases in which the reasons for the rule are fully and clearly stated. They are: *Thompson v. Thompson* (Tenn. Ch.), 54 S. W. 145; *Renshaw v. First Nat. Bank*, 63 S. W. 194; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Mee v. Mee*, 113 Tenn. 453, 106 Am. St. Rep. 865, 82 S. W. 830.

It being settled that Mrs. Madora Waller, under the conveyance made to her by W. H. Hyde, and the contemporaneous agreement made with him and her husband, ⁹ R. W. Waller, held the land in trust for her said husband, R. W. Waller, the next question for determination is whether or not this trust was executed, as contended by the defendant in error, so as to vest the sole and unconditional fee simple title to the property in him. This depends on the sufficiency of the deed executed and delivered by Mrs. Waller to her husband. It is attacked on two grounds. It is said it is void and ineffective as a conveyance, because her name does not appear in the operative part of it. This omission in this case, is not a fatal defect. It sufficiently appears from the whole instrument that it is the contract and deed of Mrs. Madora Waller, and clearly expresses her intention to convey the property described in fee to R. W. Waller. It is substantially in the form prescribed by the Code, section 2013, Shannon's edition, 3680, for forms of conveyances of real estate. The only apparent defect in it is, that in the second line, after the expression of the consideration, the pronoun "I" is omitted, but this is evidently a clerical error and is supplied by the context and subsequent recitals and parts of the deed. This pronoun appears in the covenants, and the signature of Mrs. Waller at the bottom of the deed, showing that it was her intention to contract and convey in all things as set forth in the instrument thus signed and executed by her. The deed is executed by her alone, and the contract contained in it should not be attributed to any other person.

The case of *Kelton v. Brown* (Tenn. Ch.), 39 S. W. 541, is much in point. The conveying parts and covenants of the deed in question in that case were in these words: "For and in ¹⁰ consideration of the sum of two hundred dollars, cash in hand paid, I have this day bargained and sold, and do hereby transfer and convey unto W. J. Kelton, his heirs and assigns, forever, a certain lot," etc., describing the property; and, "Now, we do covenant with the said W. J. Kelton that we are lawfully seised of said property and have a good right to convey it, and that the same is unencumbered. We further covenant that we will forever warrant and defend the title to said house and lot against the lawful claims of all persons whomsoever." The court held that the use of the personal pronoun "I," in the first part of the conveyance, instead of "we," was a patent inadvertence, and that the use of the plural "we," in the covenants followed by the execution of the instrument by the wife along with the husband was sufficient to show the purpose of the parties and the intention of the wife to join in the conveyance of the property.

This is not in conflict with the case of *Berrigan v. Fleming*, 2 Lea, 271. In that case there was nothing whatever in any part of the deed indicating the intention of the wife to join in it. It was wholly the deed of the husband. There was no reference to the wife in the body of the deed, and her name only appeared as a signature to it, and in the privy examination. The deed in question is solely the deed of Mrs. Waller. No other name appears in it or to it, and every intendment is that it is her contract and deed.

The other objection to the deed is that R. W. Waller did not join his wife in its execution. It is insisted that ¹¹ a married woman cannot convey real estate, other than her separate estate, without the joinder of her husband, and that, for the nonjoinder of the husband in this case, his conveyance is void and is ineffectual to vest title in the property insured to the conveyee.

The rule invoked is the law applicable to conveyances made by married women of lands held by them in their own right and as a general estate. By the common law married women could only convey their lands by fine and common recovery. They first were authorized to convey by deed, with privy examination jointly with their husbands, by an act passed by North Carolina in 1715, which came to us with other statutes of that colony and state, and, after several

amendments by our general assembly, was carried into our code, section 2076, and is now the law in this state.

The power of married women to convey their general estate in land by deed is vested in them by this statute only when their husbands join in the execution of the deed, or, in other words, their incapacity to convey real estate so held by them is removed, so as to enable them to convey by joint deed of the husband and wife, with proper privy examination of the latter, and otherwise it remains as at common law, and in order to effect a valid conveyance of the title of a married woman to her general estate, the statute must be strictly pursued. This is all that is held in the cases cited and relied upon by counsel for plaintiff in error to sustain his contention that the deed of Mrs. Waller to her husband is void, because ¹² she alone executed it, the chief of which are: Cope v. Meeks, 3 Head, 387; Gillespie v. Worford, 2 Cold. 632; Mosely v. Partee, 5 Heisk. 26; Giffin v. Giffin (Tenn. Ch.), 37 S. W. 710; Ellis v. Pearson, 104 Tenn. 591, 58 S. W. 318.

This rule and these cases, however, have no bearing on the case at bar. Mrs. Waller did not hold and convey the property insured in her own right, but as trustee for her husband. By the common law married women had the capacity and the power to take and hold lands as trustee and to execute the duties and powers of the trust, including that of conveying the trust property by deed, without the concurrence and joinder of their husbands in all things as could a feme sole. The reasons upon which the common-law rule withholding from a married woman the power to convey her general estate was founded, and for the provisions of the statute requiring the concurrence of her husband in her conveyance, which are that the husband may be present to protect his wife from imposition, and his marital rights in the property conveyed, and to prevent domestic disturbances, do not apply to cases where she is acting as trustee, for as a rule a trustee has no beneficial interest in the trust, and there is therefore no interest for the husband to protect; but we do not mean to hold that a married woman cannot now accept and execute a trust in which she is interested. The authorities fully support these conclusions.

Mr. Bishop in his work on Married Women, volume 1, section 700, says: "Since the wife has the capacity to receive an estate, real or personal, she may receive it as ¹³ trustee for

use of the third person"; citing *Gridley v. Winant*, 23 How., 500, 16 L. ed. 411; *Springer v. Berry*, 47 Me. 330; *Sawyer's Appeal*, 16 N. H. 459; 2 *Kent's Commentaries*, 151; *Barneby v. Griffin*, 3 Ves. 266.

He further says, volume 2, sections 115-118: "We saw in the first volume that a wife may be a trustee even where she is under all the incapacities of the law. A fortiori, she may be under the statutes which free her more or less from the disabilities of coverture, and confer on her the power to hold property like a feme sole to her own use. As a husband may, and often does, hold property, the true owner of which is his wife, and the wife sometimes holds property, the true owner of which is her husband, this doctrine of resulting trust finds a not infrequent exemplification in the marriage relation. And it is in essence and principle precisely the same between husband and wife as between any other persons."

Mr. Perry in his work on Trusts, volume 1, section 48, says: "Married women may become trustees by deed, gift, bequest, appointment, or by operation of law. If an estate comes to a married woman in any way charged with a trust, her coverture cannot be pleaded in bar of the trust; and a court of equity will enforce its execution; and when the legal title to lands in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree. But specific performance will not be enforced by feme covert trustee ¹⁴ for sale upon her contract as trustee to convey. There is no less judgment and discretion in the woman after marriage than before. Sir John Trevor thought she rather improved by her husband's teaching. The reasons of her disabilities are founded upon her own interests, or her husband's or both; or rather upon the broader policy of the law which, for the purpose of domestic peace and happiness, merges the proprietary interests of the wife during coverture in her husband, and will not permit her to hold interest separate from and independent of, and possibly antagonistic to, him. But the policy of the law has, however, been very much modified by legislation in later years. But where such interests are not concerned, she possesses the same legal capacity as if she were *sui juris*. Thus, she may execute any

kind of power, whether simply collateral, appendant, or in gross; and it is immaterial whether it is given her while sole or married.

"In equity the absolute interest in the trust fund is vested in the cestui que trust. The trustee is a mere instrument, and any power or authority in the trustee must have the character of a power simply collateral; therefore, there is nothing, as respects legal capacity, to prevent married women from administering a discretionary trust. But she cannot create a trust in her absolute property, except by joining her husband in conveying it, or in executing a declaration of trust."

In section 50 the author points out certain inconveniences¹⁵ which may arise in the execution of a trust by a married woman, on account of her inability to execute bonds and do certain other things, and then (section 51) says: "Subject to these inconveniences, a married woman can always be a trustee; and she may even be a trustee for her husband, as well as her husband for her, and courts will find means to enforce the trusts."

In *Moore v. Cottingham*, 90 Ind. 239, the wife in the execution of a parol trust in favor of her husband, conveyed the property for his use, without his joinder, and the conveyance was held valid. In that case it is said: "Had she been the beneficial owner of the land the deed would have been worthless, as a married woman has no power to convey her lands, unless the husband joins in the conveyance. This rule, however, does not apply to lands held by her as trustee, but by express terms of the statute applies to lands of the wife, that is, those of which she is the beneficial owner. As to those held by her as trustee, she is under no legal disability, but possesses the same capacity as though she were a feme sole. This must be the rule, as it is well settled that a married woman may be a trustee, even for her husband, and she may be compelled to execute her trusts. . . . This must in the very nature of things be so, especially in view of the fact that the husband was himself the cestui que trust. If, then, the wife could have been required to convey the land in execution of the trusts, it must follow that her conveyance of it voluntarily made, amounts to a complete execution of the same. The husband¹⁶ could not have been required to unite in the deed, and therefore the deed of the wife was sufficient. It

therefore appears to us that the trust, found by the court to exist, may be proved to show that the deed made was in execution of such trust, and that it was sufficient for such purpose."

In *Harden v. Darwin*, 66 Ala. 55, a well-considered case, it is said: "The first principle is well settled, without conflict among the authorities, that a married woman could, at common law, act as trustee, not being incapacitated to do so by the fact of coverture: 1 Bishop on Married Women, 700; 2 Bishop on Married Women, 115; 1 Perry on Trusts, 48, 49; Hill on Trustees, 48; Lewin on Trusts and Trustees, 34, 35. And the principle is, in a measure, strengthened by the policy of modern legislation, which has established a system of 'married women's laws,' encouraging the tenure of feme covert of separate estates in their own name and for their own benefit, and conferring on them the right to sue and be sued alone in certain cases, and authorizing them to devise or bequeath such property as if they were feme sole: Const. 1875, art. X, 6, 7; Code 1876, 2704-2713, 2892.

"The wife's power as trustee, over such property as she may hold in trust seems also to be well settled. Chancellor Kent says: 'She may transfer a trust estate, by lease and release, as a feme sole': 2 Kent's Commentaries, 151. It is added in Bishop on Married Women, 700, that 'she may execute a power of attorney to convey such an estate, and a conveyance under it will be good. She ¹⁷ may, likewise, bring suits as trustee, which has been allowed where her husband joined as plaintiff with her.'

"In *Gridley v. Wynant*, 23 How. (U. S.) 500, 16 L. ed. 411, it was said by Campbell, J.: 'There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character. A trustee, in equity, is regarded in the light of an instrument, or agent, for the cestui que trust, and the authority confided to him is in the nature of a power. It has long been settled that a married woman may execute a power, without the co-operation of her husband.' And it has never been doubted, we may add, that she may act as agent, either for her husband or a stranger, and that coverture takes from her no capacity in this respect: 1 Bishop on Married Women, 701; *Lang v. Waters*' Admr., 47 Ala. 624. And where there is an agreement, express or implied, on the wife's part, to convey to the

husband on request by him, there is a clear resulting trust; 2 Story's Equity Jurisprudence, 12th ed., 1201-C, note 1; 2 Bishop on Married Women, 124; Cotton v. Wood, 25 Iowa, 43; also Cairns v. Coolburn, 104 Mass. 274; Whitten v. Whitten, 3 Cush. 191; Fox v. Doherty, 30 Iowa, 334."

There is no statute in Tennessee changing the common law on this subject. Those of North Carolina and Tennessee, to which we have referred, were not intended to restrict the capacity and powers of married women, but to enlarge them, and they apply only to conveyances of lands held by females covert in their own right.

¹⁸ A married woman in Tennessee, when not restricted by the muniments of title under which she holds, may also convey lands held by her as a separate estate without the joinder of her husband; Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353; Vick v. Gower, 92 Tenn. 391, 21 S. W. 677; Dewey v. Goodman, 107 Tenn. 244, 64 S. W. 45. This, however, does not affect this case.

We are therefore of the opinion that in this state a married woman may accept, hold and execute a trust relating to real estate, and that she has the power, in the execution of the trust, to convey real estate without the concurrence of her husband or his joinder in the conveyance made by her; and that this rule extends to trusts in which the husband of the trustee is the beneficiary, and to conveyances made in its execution directly to him.

It is also contended by the plaintiff in error that, since the defendant in error concedes the parol trust created in his favor to have been tainted with fraud, it is void, and this court will not enforce it. This would be a very serious question, and we think a fatal one, to the case of the defendant in error but for the fact that the trust has been executed by the conveyance made to him by Mrs. Waller, and there is now no effort in this case to enforce it. The defendant in error now has both the legal and equitable title to the property in question, and the previous fraud will not bar him from a recovery upon a contract in relation to it, or for trespass committed ¹⁹ upon it: Butlar v. Butlar, 67 N. J. Eq. 136, 56 Atl. 722; Bolton v. Pittney, 46 N. J. Eq. 610, 22 Atl. 56.

It results, therefore, that there is evidence in the record tending to show, and we think sufficient for that purpose,

that the defendant in error was the sole and absolute owner of the houses insured and destroyed, and that he was seised in fee of the lots upon which they were erected, as covenanted in the policy, and therefore this assignment of error must be overruled.

Other assignments of error were disposed of in an oral opinion. Judgment affirmed.

THE CREATION OF TRUSTS IN LAND BY PAROL

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I. Nature, Kinds and Validity in General

By an express trust in land is meant one that is created by express agreement of the parties: *Learned v. Tritch*, 6 Colo. 433; *Oberlander v. Butcher*, 67 Neb. 410, 93 N. W. 764.

In England, before the adoption of the statute of frauds in 1676, express trusts in land possessed the same force and validity when created by parol, or, in other words, orally, as when created in writing.

By that act, however, in order that an express trust in land might be enforceable, it was made requisite that it be manifested in writing. Only trusts by implication of law and resulting trusts were excepted from this requirement.

This statute, in connection with quite similar exceptions, has been adopted in most of the states of the Union, and in some of them the

further requirement has been added that express trusts in land must not only be manifested, but must also be created, in writing: See *Learned v. Tritch*, 6 Colo. 433.

The class of trusts excepted from the requirement of writing has been variously named in various jurisdictions as trusts by implication of law, trusts by operation of law, implied trusts, constructive trusts, resulting trusts, or trusts arising or resulting by operation of law. In the light of judicial discussion of these terms it may now be said that the phrases "trusts by implication of law," "trusts by operation of law," "implied trusts," and "trusts arising or resulting by operation of law" are all synonymous, and embrace all trusts where a transaction of equitable cognizance is inseparably connected with the creation of the trust. The terms "constructive trusts" and "resulting trusts," on the other hand, signify the two kinds of implied trusts. (The question of terminology is somewhat discussed in *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640, and by Brown, P. J., in *Hutchinson v. Hutchinson*, 84 Hun, 482, 32 N. Y. Supp. 390.)

A resulting trust is one which results from the conduct and relation of the parties to a transfer of land, independently of any agreement whatsoever between them: *Learned v. Tritch*, 6 Colo. 433. It is a pure creation of equity to promote what is conceived by the law to be good faith between the parties, and exists only in the absence of an agreement between them in relation to its subject matter: *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Pollard v. McKenney*, 69 Neb. 74, 96 N. W. 679, 101 N. W. 9; *Jamison v. Miller*, 27 N. J. Eq. 586; *Wiser v. Allen*, 92 Pa. 317. Thus where land is deeded to one person by absolute deed while another pays the consideration therefor, in the absence of any agreement between the parties, the law raises a resulting trust in the land, so that the apparent grantee holds the title as trustee for the person who paid the consideration: *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526.

A constructive trust, on the other hand, is merely an express trust wherein some transaction of equitable cognizance is inseparably connected with the creation of the trust, so that a court of equity has jurisdiction to administer relief to the parties on the whole transaction, including the express agreement between them, notwithstanding that agreement is oral and would not be cognoscible in a court of justice in the absence of the equitable elements connected with it. A constructive trust can never arise in the absence of an express agreement of trust between those concerned in the transfer of the legal titles of land, but is always superimposed upon and could not exist without an express oral trust, which in turn would be unenforceable without the constructive trust. A person who holds

land subject to a constructive trust is often termed in the decisions a trustee *ex maleficio*. (See the third division of this article for a full discussion of constructive trusts.)

It is appropriate, therefore, to divide all express oral trusts in land into two classes: Constructive trusts, and those in which no transaction of equitable cognizance is involved, which may properly be called simple trusts. Resulting trusts are not, however, in any view, express trusts. Indeed, a resulting trust does not arise where there is an express agreement of trust between the parties, although such agreement is invalid. (See cases cited on page 775.)

In the absence of a statute of frauds prohibiting oral trusts in land, the distinction between simple and constructive trusts is mostly immaterial, for in such case, except as affected by the necessity of consideration to support simple trusts, the validity and effect of simple and constructive trusts is substantially the same; but in jurisdictions where simple trusts are required to conform to the requirements of a statute of frauds, from the operation of which constructive trusts are excepted, a wide divergence becomes manifest between the validity and effect of simple and constructive trusts.

Conceding that the statute of frauds is a wise and salutary enactment, there is fair ground for the distinction which it recognizes between simple and constructive oral trusts. If the rule requiring at least a written memorandum, in case of dealings with land, was to have any efficiency at all, it is manifest that a mere careless indifference to or negligent disregard of its requirements, as is shown in an attempt to create a simple verbal trust, must be interdicted. Where, however, there is some equitable excuse for neglect of the requirements of the statute, as where, for instance, that neglect was induced by inadvertence, mistake, imposition, or fraud, either of which has always been a ground for equitable interposition, a constructive trust arises, and courts of equity are ever ready to intervene, the statute law permitting.

II. Simple Trusts.

a. The General Rule.

1. *Necessity of Writing in General.*—In most states a simple trust in land, to be enforceable, must be in writing: *Oden v. Lockwood*, 136 Ala. 514, 33 South. 895; *Salysers v. Smith*, 67 Ark. 526, 55 S. W. 936; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Hayden v. Denslow*, 27 Conn. 335; *Walker v. Brown*, 104 Ga. 357, 30 S. E. 867; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Brown v. White*, 32 Ind. App. 100, 67 N. E. 273; *Gregory v. Bowlby*, 115 Iowa, 327, 88 N. W. 822; *Wright v. King*, Har. Ch. 12; *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771; *Elder v. Webber* (Neb.), 92 N. W. 126; *Eaton v. Eaton*, 35 N. J. L. 290; *Sturtevant v. Sturtevant*,

20 N. Y. 39, 75 Am. Dec. 371; *Wheeler v. Reynolds*, 66 N. Y. 227. In some of these states the language of this rule in substance is that such trust must be manifested or proved by some writing signed by some party enabled to create the trust: *Learned v. Tritch*, 6 Colo. 433; *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323; *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859; *McClain v. McClain*, 57 Iowa, 167, 10 N. W. 333; *Andrew v. Concanon*, 76 Iowa, 251, 41 N. W. 8; *Brown v. Barngrover*, 82 Iowa, 204, 47 N. W. 1082; *Dunn v. Zwilling*, 94 Iowa, 233, 62 N. W. 746; *Hoon v. Hoon*, 126 Iowa, 391, 102 N. W. 105; *Heddleston v. Stoner*, 128 Iowa, 525, 105 N. W. 56; *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804; *Dorsey v. Clarke*, 4 Har. & J. 551; *McElderry v. Shipley*, 2 Md. 25, 56 Am. Dec. 703; *Wolf v. Corby*, 30 Md. 356; *Northampton Bank v. Whiting*, 12 Mass. 104; *Green v. Cates*, 73 Mo. 115; *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Smith v. Howell*, 11 N. J. Eq. 349; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426; *Jackson v. Moore*, 6 Cow. 706; *Jeremiah v. Pitcher*, 20 Misc. Rep. 513, 45 N. Y. Supp. 758; *Dilts v. Stewart* (Pa.), 1 Atl. 587; *Pinney v. Fellows*, 15 Vt. 525; but in other states the more stringent language is used that such trust must be created or declared in writing signed by such party: *Patton v. Beecher*, 62 Ala. 579; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Brackin v. Newman*, 121 Ala. 311, 26 South. 3; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53, 40 S. E. 757; *Eaton v. Barnes*, 121 Ga. 548, 49 S. E. 593; *Ellis v. Hill*, 162 Ill. 557, 44 N. E. 858; *Monson v. Hutchin*, 194 Ill. 481, 62 N. E. 788; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53; *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152; *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Thompson v. Marley*, 102 Mich. 476, 60 N. W. 976; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Hansen v. Berthelson*, 19 Neb. 433, 27 N. W. 423; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Fleming v. Donahue*, 5 Ohio, 255. It would seem, however, that both expressions of the rule have been interpreted by the courts as a statement of a rule of evidence preventing the proof of a simple trust by parol rather than as one of substantive law wholly invalidating it, and no clear difference in the application of the statutory rule, based on this difference of language, can be discerned. There nevertheless are some decisions wherein the courts have declared that where such trusts are not duly manifested in writing they are void (*Moore v. Campbell*, 102 Ala. 445, 14 South. 780; *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526; *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930; *Monson v.*

Hutchin, 194 Ill. 431, 62 N. E. 788; Hain v. Robinson, 72 Iowa, 735, 32 N. W. 417; Rogers v. Richards, 67 Kan. 706, 74 Pac. 255; Dorsey v. Clarke, 4 Har. & J. 551; Wolf v. Corby, 30 Md. 356; Renz v. Stoll, 94 Mich. 377, 34 Am. St. Rep. 358, 54 N. W. 276; Luse v. Reed, 63 Minn. 5, 65 N. W. 91; In re Ryan's Estate, 92 Minn. 506, 100 N. W. 380; Coffery v. Sullivan (N. J. Eq.), 49 Atl. 520; Salter v. Bird, 103 Pa. 436, in equity as well as at law (Wheeler v. Reynolds, 66 N. Y. 227), and this language is also found in some of the statutes; but in the decisions this language has usually been used merely in repetition of the statutory language or else in cases where it was immaterial whether the oral trust was void or merely unenforceable, and in the statutes its force is generally modified by the context. In McCormick Harvesting Machine Co. v. Griffin, 116 Iowa, 397, 90 N. W. 84, however, it is said with strict accuracy that an oral trust in land is not void, but merely unenforceable by reason of the inability of the cestui que trust to prove it. For oral evidence is not admissible for that purpose, but only documentary: Maroney v. Maroney, 97 Iowa, 711, 66 N. W. 911; Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461; Hillman v. Allen, 145 Mo. 638, 47 S. W. 509; Graves v. Graves, 29 N. H. 129; Farrington v. Barr, 36 N. H. 86; Moore v. Moore, 38 N. H. 382; McVay v. McVay, 43 N. J. Eq. 47, 10 Atl. 178; Aller v. Crouter, 64 N. J. Eq. 381, 54 Atl. 426; Rathbun v. Rathbun, 6 Barb. 98; Jeremiah v. Pitcher, 20 Misc. Rep. 513, 45 N. Y. Supp. 758.

It follows from this rule requiring documentary evidence of a trust in land that an absolute deed of land cannot be changed by oral testimony into a deed of trust: Jones v. Van Doren, 18 Fed. 619; Skahen v. Irving, 206 Ill. 597, 69 N. E. 510; Rogers v. Ramey, 137 Mo. 598, 39 S. W. 66. Thus an oral agreement by the grantee of land to hold it in trust for the grantor or to reconvey it to him upon the happening of a certain event is not enforceable: Patton v. Beecher, 62 Ala. 579; Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790; Lawson v. Lawson, 117 Ill. 98, 7 N. E. 84; Biggins v. Biggins, 133 Ill. 211, 24 N. E. 516; Campbell v. Brown, 129 Mass. 23; Hillman v. Allen, 145 Mo. 638, 47 S. W. 509; O'Brien v. Gashin, 20 Neb. 347, 30 N. W. 274; Dailey v. Kinsler, 31 Neb. 340, 47 N. W. 1045; Thomas v. Churchill, 48 Neb. 266, 67 N. W. 182; Veeder v. McKinley-Lanning Loan & Trust Co., 61 Neb. 892, 86 N. W. 982; Doying v. Chesebrough (N. J. Eq.), 36 Atl. 893; Pusey v. Gardner, 21 W. Va. 469; Fairchild v. Radall, 9 Wis. 379. This is equally true, although the grant was made without consideration: Gregory v. Bowlsby, 115 Iowa, 327, 88 N. W. 822; Gee v. Thraikill, 45 Kan. 173, 25 Pac. 588; Farrington v. Barr, 36 N. H. 86. Thus an oral promise by the grantee to will certain other property to the grantor (Manning v. Pippen,

86 Ala. 357, 11 Am. St. Rep. 346, 5 South. 572), or to support the grantor for life (*Salysers v. Smith*, 67 Ark. 526, 55 S. W. 936), or to hold the deed as an escrow (*Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379), or to permit the grantor to repurchase it at a given price (*Harper v. Harper*, 5 Bush, 176), or to reconvey to the grantor in case of failure to pay the purchase price (*Gallagher v. Mars*, 50 Cal. 23), is not enforceable. Moreover, where the grantee in violation of the trust sold the land and appropriated the proceeds, the grantor cannot maintain an action to recover the proceeds: *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859. And where a grantor of land claims that the grantee obtained the grant by fraud, and such grantee had in turn granted it to a third person on an oral trust to hold for herself, and the first grantor brought an action to compel a reconveyance of the land wherein a default judgment was obtained against the latter grantee, even if it appeared on a trial subsequent to the entry of the default that the first grantee did not obtain the deed by fraud, she is not entitled to relief against the first grantor, the trust by which the land was held for her being oral and the default against the latter grantee not having been set aside: *Dailey v. Kinsler*, 31 Neb. 340, 47 N. W. 1045.

Similarly, where the grantor of land by absolute deed conveys it to the grantee under a verbal trust on his part to hold the land in trust for a third person, the trust is unenforceable: *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Prouty v. Moss*, 111 Ill. App. 536; *Green v. Cates*, 73 Mo. 115.

Again, an oral agreement by a grantee of land to take and hold for another land, the purchase price of which was paid for by the other, is within the statute of frauds: *Coleman v. Bowles' Admr.* (Ky.), 56 S. W. 651.

Likewise a declaration by a person on his deathbed that he desired that one-half of certain land should be the property of a certain person does not, he having made no will, create a trust in the land as against his heir: *Campbell v. Brown*, 129 Mass. 23.

And where land subject to an oral trust passed by mesne conveyances to a certain grantee, who, dying, the property passed to her heirs, the trustor cannot enforce the trust as against her heirs: *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84.

Finally, in *Farrand v. Beshoar*, 9 Colo. 291, 12 Pac. 196, the court held that where a simple trust in land rests in parol, a decree sustaining the trust cannot be sustained.

2. What Constitutes Trust in Land Within Rule.—In some states the rule requiring a trust to be manifested in writing is directed not alone at trusts concerning lands, but also at trusts in any manner relating to lands: *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 68 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Ryan v. Dox*, 34

N. Y. 307, 90 Am. Dec. 696. It is therefore held that where by a will certain land was devised to a devisee under an oral trust that the devisee would give five hundred dollars to a certain beneficiary, the fact that the executor of the estate was required by the will to sell and convert into money all the estate before distribution does not validate the trust as one relating to moneys: *Moore v. Campbell*, 102 Ala. 445, 14 South. 780. And where a grantor conveys land to another for a part present consideration and on the agreement that the grantee shall hold one-half of the land in trust for the grantor, and upon the sale of the land pay the grantor one-half the net avails thereof, an action to recover from the grantee one-half thereof cannot be maintained: *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771.

In *Betchel v. Ammon*, 199 Pa. 81, 48 Atl. 873, however, the court holds that an oral trust to sell lands and account for the proceeds, where the lands have been sold and the proceeds are in the hands of the trustee, is not within the statute of frauds. And in New York, where the statute of frauds has the broad language mentioned in the preceding paragraph, the court held that where land is conveyed under an oral trust to hold for a certain cestui que trust, and the grantee conveys all the land to purchasers and receives the purchase money and pays over all except the last portion of it to the cestui que trust, but refuses to pay over such residue, the cestui que trust may maintain an action to recover it and the statute of frauds is no defense therein, the trust having been performed so far as it concerned realty. "If the defendant should say that he now can keep the money because he once could keep the land, still the plaintiff can say with better justice that he is not entitled to the money because it was originally his, and though he voluntarily suspended his right to it for a season, he did so without lawful consideration and in confidence that when it could be restored to him it would be. That time has come, and there is no obstacle to its restoration": *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584.

Again, the fact that a chose in action was secured by a mortgage on land does not render a trust in the chose in action subject to the provisions of the statute of frauds relating to trusts in land: *Patterson v. Mills*, 69 Iowa, 755, 28 N. W. 53.

3. *Manifestation of Oral Trust in Writing.*—It is not requisite that the writing whereby a simple trust in land is manifested be made contemporaneously with the creation of the trust, but it may be established by a writing signed by the alleged trustee and setting forth the trust made at any time, whether long thereafter or in anticipation and contemplation thereof: *Jackson v. Moore*, 6 Cow. 706; *Rathbun v. Rathbun*, 6 Barb. 98; *Hutchinson v. Hutchinson*, 84 Hun, 482, 32 N. Y. Supp. 390; *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426. Thus where the grantee of land took the same on a verbal trust to convey a por-

tion thereof to the value of five hundred dollars to her daughter upon her arrival at the age of twenty, and five years afterward put this verbal agreement in writing, there is a valid enforceable trust in her daughter's favor: *Pendleton v. Patrick* (Ky.), 57 S. W. 464. So where the grantee of land under an oral trust put the same in writing in strict accordance with the oral declaration a long time after the title to the land had vested in him, the trust is valid against a creditor of the trustee: *Iauch v. De Socarras*, 56 N. J. Eq. 538, 39 Atl. 370.

This written evidence of the trust "may be found and deduced from one or more writings if they bear a relation to each other and import a trust. The writing need not be of a formal character, but a trust may be imported and proved by letters, deeds, and other writings signed by the party to be charged": *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426. It may thus be deduced from a writing made ten years after the creation of the trust, which writing the trustee had signed merely by writing his initials in the body: *Smith v. Howell*, 11 N. J. Eq. 349.

Moreover, "while parol evidence of an express trust is to be rejected, yet, when an instrument is claimed to be an acknowledgment and proof of such a trust, the circumstances under which it was made may be used to elucidate its construction": *Aller v. Crouter*, 64 N. J. Eq. 381, 54 Atl. 426.

Depositions and Pleadings as Manifestation of Trust.—In some decisions it is held that a simple oral trust is sufficiently manifested in writing by a deposition signed by the alleged trustee and clearly setting out the terms of the trust: *McIntire v. Skinner*, 4 G. Greene, 89; *Pinney v. Fellows*, 15 Vt. 525. Moreover, an answer in chancery admitting the trust, although not responsive to the bill in the cause, sufficiently manifests the trust to satisfy the statute of frauds: *Jamison v. Miller*, 27 N. J. Eq. 586. And where a verified petition to enforce an oral trust in land sets up the trust and the verified answer avers that defendant has no reason to doubt the averments of the petition, and is signed by the defendant in the verification, the trust is sufficiently manifested in writing: *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178.

In *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170, however, the court held that where a defendant in a suit to enforce a simple oral trust in lands claimed the benefit of the statute of frauds by his answer, neither an admission of the existence and character of the trust contained in his deposition, nor a similar admission in his answer, is sufficient to satisfy the requirements of the statute, for the reason that "a party who insists upon his statutory right and does not submit to waive it cannot be legally bound by a declaration or creation of trust which the statute declares to be utterly void and of no effect."

4. **Part Performance of Trust.**—"Acts of part performance, such as will furnish a foundation for enforcing a verbal contract respecting land otherwise void under the statute of frauds, must be such as are done in pursuance, or according to the terms, of the contract, and which in some manner affect or change the relation of the parties so that they would be defrauded if the contract were not enforced. . . . Actual possession in furtherance of the terms of the contract, especially when accompanied by the making of permanent and valuable improvements upon the premises, may be made the foundation for a decree of specific performance; but mere possession will not be deemed a part performance sufficient to justify such relief when it may be fairly referable to some other cause than the execution of the contract": *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883. "Acts to be deemed a part performance of a parol agreement, so as to estop a party from insisting upon the statute of frauds, should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement of which they are a part execution. . . . And they must be a part performance of the precise agreement set up": *Rathbun v. Rathbun*, 6 Barb. 98. So where a party purchases land under a verbal agreement to hold the same in trust for another, and the latter on the faith of the agreement thereupon advances a part of the purchase money and comes from another state and takes possession of the premises, there is such part performance and execution of the trust as takes it out of the statute of frauds: *Oberlender v. Butcher*, 67 Neb. 410, 93 N. W. 764. This same principle is also applicable where the cestui que trust of land takes possession or remains in possession thereof pursuant to a verbal agreement made at the time of the creation of an oral trust therein: *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Simonton v. Godsey*, 174 Ill. 28, 51 N. E. 75; *Dorsey v. Clarke*, 4 Har. & J. 551. Where, however, the trustee charges the cestui que trust in possession with rent, entering the same in his books, the effect of the possession as part performance is annulled: *Dorsey v. Clarke*, 4 Har. & J. 551. And where after title to land is taken in the name of another the cestui que trust merely remains in possession without any agreement that such possession was in pursuance of the verbal trust, the case is within the statute of frauds: *Wentworth v. Wentworth*, 2 Minn. 277 (Gil. 238), 72 Am. Dec. 97. Similarly, where the cestui que trust goes into possession pursuant to the terms of a subsequent verbal agreement, independent of the agreement of trust, he cannot defend his right to continue possession thereof on the ground of the oral trust existing in his favor: *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883.

Finally, a verbal promise by the owner of land, not founded on a valuable consideration, to convey certain land to one who was in possession thereof by his permission, cannot be enforced against him or his heirs: *Tolleson v. Blackstock*, 95 Ala. 510, 11 South. 284.

5. **Execution of Trust.**—"The statute of frauds is an insuperable bar to an action to enforce a parol contract within its provisions, but it does not make the transaction illegal, and parties are at liberty to act under such contracts if they see proper": *Eaton v. Eaton*, 35 N. J. L. 290. It was enacted, not that parties might avoid trusts that were executed, but rather to enable them, in case of an attempt to enforce such trusts while they remained executory, to insist on certain modes of proof in order to establish them: *Hays v. Regar*, 102 Ind. 524, 1 N. E. 386. Thus a person who holds land subject to a simple oral trust has a right to recognize his moral obligation and convey the land to such person as his grantor intended, and on the conditions the latter thought fit to impose, and when such conveyance is made the trust is executed, and it becomes immaterial whether or not its performance could have been compelled: *Robbins v. Robbins*, 89 N. Y. 251. So where lands that were in fact the separate property of a wife, but stood in the names of herself and husband, and they joined in a deed of the lands to a third person under a verbal trust on his part to reconvey to the wife individually, such trust is not void, but only voidable, and if the property was in fact reconveyed before any equities attached to it in the hands of the third person, the reconveyance would put an unimpeachable title in the wife: *Gallagher v. Northrup*, 215 Ill. 563, 74 N. E. 711, *Cartwright and Hand, JJ.*, dissenting, reversing 114 Ill. App. 368. And where a party receives a conveyance of lands from his brother on the oral understanding that in case of the brother's death he would convey to his daughters, which conveyance, the brother having died, he makes, such conveyance would be regarded as made in performance of such agreement, and would be upheld as not affected by the statute of frauds: *Collins v. Collins*, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597.

The trust, when executed, is also valid against third parties as well as between the parties. It does not lie in the mouth of a third party in whose favor no estoppel is shown to exist to say that the contract creating the trust was void and conferred no rights: *McCormick Harvesting Machine Co. v. Griffin*, 116 Iowa, 397, 90 N. W. 84. So where a widow who held land under an oral trust for her children conveyed to each his respective share, a second husband is not entitled to claim dower in such land: *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245. And where such trust is executed, it is valid against a judgment creditor of the trustee: *Hays v. Regar*, 102 Ind. 524, 1 N. E. 386.

The validity of a simple oral trust, when fully executed, is also affirmed in many other cases: *Polk v. Boggs*, 122 Cal. 114, 54 Pac. 536; *Church v. Sterling*, 16 Conn. 388; *Hayden v. Denslow*, 27 Conn. 335; *Stringer v. Montgomery*, 111 Ind. 489, 12 N. E. 474; *Barber v. Milner*, 43 Mich. 248, 5 N. W. 92; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 80 N. E. 584. And in support of a conveyance

made pursuant to such oral trust in land, the parol agreement creating may be proven: *Brown v. White*, 32 Ind. App. 100, 67 N. E. 273

b. The Exceptional Rule.

1. **Creation Contemporaneously with Transfer of Land.**—In a few states there is no statutory provision requiring a trust in lands to be manifested in writing, and an express simple trust may be created by an oral declaration of trust made contemporaneously with, or in contemplation and anticipation of, the transfer of the legal title to land by absolute deed: *Cohn v. Chapman*, 62 N. C. 92, 93 Am. Dec. 600; *Pittman v. Pittman*, 107 N. C. 159, 12 S. E. 61, 11 L. R. A. 456; *Dover v. Rhea*, 108 N. C. 88, 13 S. E. 614; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93; *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645; *Haywood v. Ensley*, 8 Humph. 460; *Thompson v. Thompson* (Tenn. Ch.), 54 S. W. 145; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Renshaw v. First National Bank* (Tenn.), 63 S. W. 194; *James v. Fulrod*, 5 Tex. 512, 55 Am. Dec. 743; *Mead v. Randolph*, 8 Tex. 191; *Bailey v. Harris*, 19 Tex. 108; *Leaky v. Gunter*, 25 Tex. 400; *Gardner v. Russell*, 70 Tex. 453, 7 S. W. 781. Compare *Mathews v. Massey*, 4 Baxt. 450. So where a person, being in default in the payment of the installments of the purchase price of certain land, accepted the offer of a third person to pay the amount due and hold the land for him, and assigned to him his contract of purchase of the land but continued in possession of it, he may compel the transferee of the land to execute the trust: *Cloninger v. Summit*, 55 N. C. 513. See, also, *Cohn v. Chapman*, 62 N. C. 92, 93 Am. Dec. 600. Where, in consideration of receiving a power of sale from the mortgagor of land, the mortgagee agreed to buy the same in at the sale thereof under the power and to convey a certain portion thereof to a trustee for the mortgagor's wife, but afterward, after his purchase of the land, refused to make such conveyance to the wife, equity will enforce the agreement: *Blount v. Carroway*, 67 N. C. 396. Where a person sold land under an oral agreement that the grantee would transfer the land to another for a certain consideration on the grantor's request, such trust is enforceable: *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645. A parol contract under which two or more persons buy land for their joint benefit, but take the title in the name of one, may be enforced against the holder of the legal title: *Gardner v. Rundell*, 70 Tex. 453, 7 S. W. 781. Moreover, where the intending purchaser of land at judicial sale agreed previously and in contemplation of the sale, or at the time of bidding, that he would hold the land subject to redemption by another person (*Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241), or held out to other intending bidders at the sale that he was purchasing for some certain person by reason whereof they were deterred from bidding against him (*Haywood v. Ensley*, 8 Humph. 460; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227), the cestui que trust may enforce the oral trust.

In Tennessee, however, it is held that it is not competent to set up a parol trust in opposition to the provisions of a deed. Indeed, if the deed upon its face and by its terms is absolute and conveys to the grantee a fee simple estate without more, the trust character can be shown by oral evidence, because this would not, in the contemplation of the law, in any way contradict the terms of the deed, but would only complete it. But if the deed contains provisions which expressly or by clear implication give the grantee a power or discretion to defeat the trust, or are inconsistent with it, then the trust does not exist in such shape as to be mandatory upon the grantee. Thus if the deed by its express terms gives the grantee the right to dispose of the land in such way as she may see fit, and for such purpose as she may deem best, a parol trust to convey the property to certain persons cannot be shown: *Mee v. Mee*, 113 Tenn. 453, 106 Am. St. Rep. 865, 82 S. W. 830.

The full validity of parol trusts in land of the type just described was also formerly recognized in several other states, but they have since been done away with by the extension of the statutes of frauds in those states: *Patton v. Beecher*, 62 Ala. 579; *Church v. Sterling*, 16 Conn. 388; *Fleming v. Donahue*, 5 Ohio, 255; *Kisler v. Kisler*, 2 Watts, 323, 27 Am. Dec. 308; *Murphy v. Hubert*, 7 Pa. 420.

Necessity of Consideration.—A consideration is not necessary to support a simple oral trust in lands, made at the time of, or in contemplation and anticipation of, the transfer of the legal title: *Sykes v. Boone*, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645. See, also, *Gardner v. Bundell*, 70 Tex. 453, 7 S. W. 781.

Effect of Particular Matter on Validity of Trust.—The fact that the cestui que trust under such an oral trust, as a condition precedent to his right to receive a conveyance of the land, was required not only to reimburse the purchaser of the legal title for his advances in purchasing it, but was also to pay a certain debt he owed the purchaser's wife, does not invalidate the trust: *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93.

Amount and Kind of Evidence Necessary to Sustain Trust.—In order that a court may give effect to an alleged oral trust in land, the evidence offered to sustain it must be clear and convincing: *Hamilton v. Buchanan*, 112 N. C. 463, 17 S. E. 159; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241; *Renshaw v. First National Bank (Tenn.)*, 63 S. W. 194. Moreover, in North Carolina at least, the subsequent declarations of the alleged trustee in support of the trust are not by themselves alone sufficient evidence to sustain a judgment enforcing the trust; but while they are admissible in evidence for that purpose, there must be evidence of other facts and circumstances inconsistent with the idea that there was an absolute purchase by the alleged trustee: *Taylor v. Taylor*, 54 N. C. 246; *Pittman v. Pitt-*

man, 107 N. C. 159, 12 S. E. 61, 11 L. B. A. 456; Cobb v. Edwards, 117 N. C. 244, 23 S. E. 241.

2. **Creation Independently of Transfer of Land.**—A trust in land cannot, however, be created by parol independently of a transfer of the legal title to the land, although for a valuable consideration, for such transaction is in effect only the sale of an interest in land by parol, and transgresses the provision of the statute of frauds requiring such a sale to be evidenced in writing: Frey v. Ramsour, 66 N. C. 466; Blount v. Carroway, 67 N. C. 396; Dover v. Rhea, 108 N. C. 88, 13 S. E. 614; Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. 159; Cobb v. Edwards, 117 N. C. 244, 23 S. E. 241; Kelly v. McNeill, 118 N. C. 349, 24 S. E. 738. Thus a parol agreement made by the purchaser of land, after the purchase was consummated, to hold the land in trust for others, is unenforceable: Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. 159; Kelly v. McNeill, 118 N. C. 349, 24 S. E. 738. And where the legal estate in lands is not conveyed, a trust cannot be raised by a parol declaration, even though founded on a valuable consideration and followed by actual occupancy and the erection of valuable improvements: Cobb v. Edwards, 117 N. C. 244, 23 S. E. 241.

III. Constructive Trusts.

a. **In General.**—As stated in the first division of this article, constructive trusts are not subject to the statutory provisions requiring an express trust to be manifested in writing, but are in almost all, if not all, jurisdictions expressly excepted from that requirement: Patton v. Beecher, 62 Ala. 579; White v. Farley, 81 Ala. 563, 8 South. 215; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Hayne v. Herman, 97 Cal. 259, 32 Pac. 171; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Church v. Sterling, 16 Conn. 388, 401; Godschalk v. Fulmer, 176 Ill. 64, 51 N. E. 852; Peterson v. Boswell, 137 Ind. 211, 36 N. E. 845; Patterson v. Mills, 69 Iowa, 755, 28 N. W. 53; Dorsey v. Clarke, 4 Har. & J. 551; Moran v. Somes, 154 Mass. 200, 28 N. E. 152; Shafter v. Huntington, 53 Mich. 310, 19 N. W. 11; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Graves v. Graves, 29 N. H. 129, 141; Farrington v. Barr, 36 N. H. 86; Moore v. Moore, 38 N. H. 382; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Salter v. Bird, 103 Pa. 436.

Nature and Kinds of Constructive Trusts.—While it has been declared that a constructive trust will arise whenever by any mistake an instrument of conveyance of land is made absolute instead of expressing the trust intended (Fairchild v. Rasdall, 9 Wis. 379), yet the ordinary ground of equitable interposition to enforce an oral trust in land is fraud, actual or constructive, and whenever actual or constructive fraud is inseparably connected with the creation of such a trust, a court of equity will take cognizance of the matter and grant appropri-

ate relief against the trustee: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Fairchild v. Rasdall*, 9 Wis. 379. In such case, however, the court does not act upon the oral agreement as the primary thing, but the fraud gives it its jurisdiction, and the oral agreement is cognizable by it as an element in the fraudulent transaction: *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Perkins v. Cheairs*, 2 Baxt. 194. In *Parker v. Catron*, 27 Ky. Law Rep. 536, 85 S. W. 740, the court says that constructive trusts are held not within the statute of frauds because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds.

Necessity of Actual Transfer of Land.—As in case of simple trusts in states where they are recognized, so constructive trusts arise only upon the actual transfer of land and not upon an executory contract to hold land in trust: *Perkins v. Cheairs*, 2 Baxt. 194.

Necessity of Clear Case.—In order that a constructive trust may be established, the fraud or mistake involved in it must be shown by clear and convincing proof. Loose, indefinite, and unsatisfactory evidence is never sufficient: *Laughlin v. Mitchell*, 14 Fed. 382; *Brock v. Brock*, 90 Ala. 86, 8 South. 11, 9 L. R. A. 287; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Wilson v. McDowell*, 78 Ill. 514; *Hammond's Admx. v. Cadwallader*, 29 Mo. 16.

b. Actual Fraud.—In order that a trust in land may arise by reason of actual fraud, the title must be obtained by the alleged trustee by false and fraudulent promises to hold and use the same for designated uses, and must subsequently be converted to other purposes or claimed by the grantee as his own. Mere subsequent fraud is not sufficient. There must be fraud in the original transaction of such a character as to constitute a fraudulent contrivance for the purpose of acquiring the legal title, and the title must have been obtained through the fraudulent contrivance: *Patton v. Beecher*, 62 Ala. 579; *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732; *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Walter v. Klock*, 55 Ill. 362; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Luce v. Reed*, 63 Minn. 5, 65 N. W. 91; *Wheeler v. Reynolds*, 66 N. Y. 227; *Salter v. Bird*, 103 Pa. 436; *Braden v. Workman (Pa.)*, 1 Atl. 655; *Perkins v. Cheairs*, 2 Baxt. 194.

Thus the mere failure or refusal of an alleged trustee to comply with the terms of an oral trust is not such fraud as will authorize a court of equity to enforce the trust: *Patton v. Beecher*, 62 Ala. 579; *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732; *Brock v. Brock*, 90 Ala.

86, 8 South. 11, 9 L. R. A. 287; *Brison v. Brison*, 75 Cal. 585, 7 Am. St. Rep. 189, 17 Pac. 698; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Perry v. McHenry*, 13 Ill. 227; *Rogers v. Simmons*, 55 Ill. 76; *Walter v. Klock*, 55 Ill. 362; *Scott v. Harris*, 113 Ill. 447; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Dunn v. Zwilling*, 94 Iowa, 233, 62 N. W. 746; *Gregory v. Bowsby*, 115 Iowa, 327, 88 N. W. 822; *Heddlleston v. Stoner*, 128 Iowa, 525, 105 N. W. 56; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *In re Ryan's Estate*, 92 Minn. 506, 100 N. W. 380; *Hammond's Admx. v. Cadwallader*, 29 Mo. 166; *Wheeler v. Reynolds*, 66 N. Y. 227; *Perkins v. Cheairs*, 2 Baxt. 194; *Fairchild v. Rasdall*, 9 Wis. 379. Nor does the denial by the trustee of the existence of such trust amount to such fraud: *Scott v. Harris*, 113 Ill. 447; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Gregory v. Bowsby*, 115 Iowa, 327, 88 N. W. 822. For "when the original transaction is free from the taint of fraud or imposition, when the written contract expresses all the parties intended it should, when the parol agreement which is sought to be enforced is intentionally excluded from it, it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a basis for a similar imputation, whenever any promise or contract is broken. . . . It is an annihilation of the statute [of frauds] to withdraw a case from its operation, because of such violation or repudiation of an agreement or trust it declares shall not be made or proved by parol. There can be no fraud if the trust does not exist, and proof of its existence by parol is that which the statute forbids. In any and every case in which the court is called to enforce a trust there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident and no reason can be assigned for the limitation": *Patton v. Beecher*, 62 Ala. 579. "If the refusal to comply with a parol agreement constitutes such fraud as to take a case out of the statute, then no case is within it. For a party has only to allege that a person contracting by parol fraudulently refuses to comply with the terms of his parol agreement, which he must do in every case, or there would be no necessity for resorting to a court of equity to enforce it, and a case is made to which the statute does not apply": *Perry v. McHenry*, 13 Ill. 227. See, also, *Brock v. Brock*, 90 Ala. 86, 8 South. 11, 9 L. R. A. 287; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Fairchild v. Rasdall*, 9 Wis. 379.

Likewise the breach of the mere oral promise of a purchaser of land to buy the same or to hold the title therefor in trust for another, though made at the time of or in contemplation of the transfer of the title to him, does not constitute such fraud as to invest a court of equity with jurisdiction to enforce the trust, where the purchaser

buys in his own name and with his own means: *Robbins v. Kimball*, 55 Ark. 414, 29 Am. St. Rep. 45, 18 S. W. 457; *Grayson v. Bowlin*, 70 Ark. 145, 66 S. W. 658; *Stephenson v. Thompson*, 13 Ill. 186; *Perry v. McHenry*, 13 Ill. 227; *Wilson v. McDowell*, 78 Ill. 514; *McDearmon v. Burnham*, 158 Ill. 55, 41 N. E. 1094; *Fowke v. Slaughter*, 3 A. K. Marsh. 56, 13 Am. Dec. 133; *Miazza v. Yerger*, 53 Miss. 135; *Hammond's Admx. v. Cadwallader*, 29 Mo. 166; *Henderson v. Hudson*, 1 Munf. 510. And the same rule is generally applicable where the purchase is made at judicial sale (*White v. Farley*, 81 Ala. 563, 8 South. 215 (foreclosure sale); *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685 (sheriff's sale, where it did not appear that bidders were deterred by the promise); *Walter v. Klock*, 55 Ill. 362 (Breesse, Scott and Sheldon, JJ., dissenting); *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177 (foreclosure sale); *Graves v. Dugan*, 6 Dana, 331 (execution sale, where the cestui que trust had actually paid the trustee the consideration on payment of which the trust was conditioned); *Bourke v. Callahan*, 160 Mass. 195, 35 N. E. 460 (foreclosure sale); *Cobb v. Cook*, 49 Mich. 11, 12 N. W. 891 (execution sale); *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513, affirming 21 N. J. Eq. 19 (execution sale); *Sherrill v. Crosby*, 14 Johns. 358 (execution sale); *Bander v. Snyder*, 5 Barb. 63 (foreclosure sale); *Lathrop v. Hoyt*, 7 Barb. 59 (foreclosure sale); *Wheeler v. Reynolds*, 66 N. Y. 227 (foreclosure sale); *Haines v. O'Connor*, 10 Watts, 313, 36 Am. Dec. 180; *Fox v. Heffner*, 1 Watts & S. 372; *Appeal of McCall (Pa.)*, 11 Atl. 206; *Salsbury v. Black*, 119 Pa. 200, 4 Am. St. Rep. 631, 13 Atl. 67), or at a tax sale (*Hain v. Robinson*, 72 Iowa 735, 32 N. W. 417), or at a sale under a power contained in a mortgage (*Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273, 43 N. E. 93), or in a trust deed in the nature of a mortgage (*Mansur v. Willard*, 57 Mo. 347), or generally at public auction (*Farnham v. Clements*, 51 Me. 426).

Where, however, the purchaser of land at public auction, by reason of his oral promise to buy the same or to hold the title therefor for the use of some person whose interest in the property is about to be sold, is enabled to obtain the land at a price greatly below its market value, it is a fraud for him to attempt to hold it in violation of said promise, and he may be held as a trustee *ex maleficio* of the land for the benefit of the cestui que trust: *Woodruff v. Jabine (Ark.)*, 15 S. W. 830; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, *Hunt, J.*, dissenting, reversing 25 Barb. 440. *Contra*, *Lamborn v. Watson*, 6 Har. & J. 252, 14 Am. Dec. 275, where the decision seemed to be based somewhat on the form of the pleadings: *Miltenberger v. Morrison*, 39 Mo. 71. Compare, also, *Sherrill v. Crosby*, 14 Johns. 358, where a bystander at a sale bought the land on the suggestion of the officer conducting it, who intimated that he would like some one to

buy it for the benefit of the execution debtor, but where the bystander made no promise to hold for the benefit of the judgment debtor. Moreover, in some decisions, it is further held that the mere repudiation of such agreement after the cestui que trust has relied upon it and refrained from taking part in the sale and from redeeming the land from the sale if redemption is allowable, is such fraud as to warrant equitable relief therefrom: *Wright v. Gay*, 101 Ill. 233; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Parker v. Catron*, 27 Ky. Law, Rep. 536, 85 S. W. 740; *Soggins v. Heard*, 31 Miss. 426; *Rose v. Bates*, 12 Mo. 30; *Leahey v. Witte*, 123 Mo. 207, 27 S. W. 402, *Brace and Gantt, JJ.*, dissenting; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548, *Agnew and Williams, JJ.*, dissenting. *Contra*, *Donohoe v. Mariposa Land & Min. Co.*, 66 Cal. 317, 5 Pac. 495. In *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513, affirming 21 N. J. Eq. 191, the court states the reason for the rule itself in the following language: "It is the precedent contract with the defendant in execution for a reconveyance and the fraudulent conduct of the purchaser in connection with the sale which have enabled him to acquire the debtor's property at an unconscionable advantage, that the court seizes hold of as a ground of equitable relief." "The jurisdiction over transactions of this nature rests on the ground of fraud and oppression on the part of the purchaser, by means of which he has obtained the property of the debtor at an inadequate price, under the assurance of a contract to reconvey to him or to hold the same subject to future redemption." The reason for the extension of the rule is said, in *Soggins v. Heard*, 31 Miss. 426, to be that the execution debtor "on the faith of such an agreement may have ceased his efforts to raise the money for the purpose of paying off the execution and thus preventing a sale of the property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefore, at his option, decline a compliance with this agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted."

Again, where at the time a grantee of land took the legal title he orally promised to hold the same on certain trusts, but then and there had no intention of performing the trusts but made them with intent to get and hold the legal title to his own use, a constructive trust arises and he becomes a trustee ex maleficio: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Gregory v. Bowsby*, 115 Iowa, 327, 88 N. W. 822. See, also, *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572. Similarly, where one actively procures a transfer of land to himself on an oral promise to hold for another, and afterward repudiates the trust, a constructive trust arises on the ground that the transferee had an active fraudulent agency and by false promises diverted

to himself the conveyance of the land: *Lantry v. Lantry*, 51 Ill. 451, 2 Am. Rep. 310; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852. *Contra*, *Walker v. Locke*, 5 Cush. 90. Likewise, a person who takes the legal title to land in himself subject to an oral trust and to the further contemporaneous oral agreement that he would put the trust in writing, but who afterward repudiated the trust and agreement, becomes a trustee of the land *ex maleficio*: *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641, where the grantee was a creditor of the grantor, and received the grant for the benefit of creditors; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548, *Agnew and Williams, JJ.*, dissenting. *Contra*, *Von Trotha v. Bamberber*, 15 Colo. 1, 24 Pac. 883, holding that the mere breach of the promise to put the oral trust in writing did not by itself amount to fraud, though it was of weight, in connection with other facts and circumstances, as an element in fraud.

Furthermore, where the absolute character of a deed of land was not known to or designated by the person paying the consideration therefor, and another was named therein as grantee, it will be presumed that the deed was so written by fraud or mistake and without intent to violate the statute of frauds, and oral evidence will be admissible to show such facts to raise a trust in behalf of the person paying the consideration: *Siemon v. Schurek*, 29 N. Y. 598, affirming *Sieman v. Austin*, 33 Barb. 9. In *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion 158 N. Y. 697, 53 N. E. 1122, the court, however, said: "It is not enough that one person has relied upon the promise of another with regard to the purchase of a piece of property. The party seeking relief in such case must go further, and show a change of position on his part, due to such reliance. He must, in fact, prove the elements of an estoppel in pais."

c. Constructive Fraud.

1. *Nature and Scope in General.*—Where confidential relations prevail between the parties to an oral trust and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue, and a case of constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practicing it: *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171; *Blount v. Carroway*, 67 N. C. 396. See, also, *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323. In *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9, the court says: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the benefits, out of such circumstances or relations a court of equity will raise a trust by construction, and fasten it upon the conscience

of the offending party, and convert him into a trustee of the legal title." So where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance thereof without consideration, through a verbal agreement which he promises to reduce to writing, as, for example, that the land conveyed to him is to be held in trust for some legitimate purpose, a refusal under such circumstances to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance or administer other proper relief: *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790.

Moreover, the statute of frauds "does not cover the cases where equity has always implied a trust from the proved relations and acts of the parties, often accompanied by their oral declarations and agreements as material facts, in order to prevent frauds": *McCahill v. McCahill*, 11 Misc. Rep. 258, 32 N. Y. Supp. 836. Thus the rule that the breach of an oral agreement to hold lands in trust for another is not of itself alone such a fraud as to take the case out of the statute of frauds, applies in its full force only where the parties sustain no trust or confidential relations to each other, or where they are simply contracting parties in the ordinary sense: *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion, 158 N. Y. 697, 53 N. E. 1122.

2. Domestic Relations.

A. Husband and Wife.—In California the relation of husband and wife is a confidential relation, and when this confidence is violated by the refusal of one spouse to execute an oral trust on which land was transferred to him or her, as a trust to reconvey the land to the other spouse on request (*Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689), or to hold the land for the joint use of the two spouses (*Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122), or to so hold it during their joint lives and afterward to hold one-half thereof for the use of their daughter (*Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171), a constructive trust arises which a court of equity will enforce and to establish which parol evidence is admissible. So in *Thompson's Lessee v. White*, 1 Dall. 424, 1 Am. Dec. 252, 1 L. ed. 206, where a wife, desiring her husband to have the use of her separate lands during his life, conveyed them to a third party who reconveyed them to herself and husband as joint tenants under a parol promise on the part of the husband by will or other means to settle the lands on her sisters and children, but the husband died after the wife without having made such settlement, the court enforced such oral trust in behalf of the beneficiaries thereof against the heirs of the husband and a grantee of them with notice. In *Brison v.*

Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, the court said: "If the relief cannot be granted in this case, we do not see how it could be granted if an attorney should, by his parol promise, induce his client to put the property in his name for some temporary purpose, and then refuse to reconvey on the ground of the absence of a written acknowledgment; and so of principal and agent, parent and child, trustee and cestui que trust, etc."

In other states, however, where the title to land is put in the name of a wife on a verbal trust to hold the whole or a part thereof for her husband, the courts have overlooked the principle on which the foregoing cases are decided and have refused to enforce the trust: *Murray v. Murray*, 153 Ind. 14, 53 N. E. 946; *Andrew v. Andrew*, 114 Iowa, 524, 87 N. W. 494; *Fitzgerald v. Fitzgerald*, 168 Mass. 488, 47 N. E. 431; *Gibson v. Foote*, 40 Miss. 788. Similarly, where a party conveyed land to his son in law on an oral trust to hold for his wife, the grantor's daughter, the courts refused to enforce the trust: *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Dilts v. Stewart* (Pa.), 1 Atl. 587. And where a husband conveys land to his wife under a parol agreement that she should hold for the benefit of their children, the trust is invalid and cannot be enforced: *Moran v. Somes*, 154 Mass. 200, 28 N. E. 152.

B. Parent and Child.—In some decisions it is intimated that an oral trust is enforceable as between parent and child on the ground of constructive fraud: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790. This has also been directly held. Thus where a son, to enable his mother to act as a redemptioner of certain land of his which had been sold on execution, permitted her to take a judgment against him by confession for certain moneys which she had advanced to him, and she thereupon redeemed the land on an oral agreement to transfer it to her son upon payment of the amount advanced by and owing to her, which transaction the son entered into on the advice of his mother's attorney, his former guardian, a court will compel the mother to fulfill the trust: *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640. Where a mother conveyed the family homestead to one son without consideration on a verbal trust that he would hold it for himself and the other children of his mother, and pay the taxes and interest on the mortgage, receiving in return the rentals accruing on the homestead and free board and lodging, and where all parties acquiesced in and fulfilled the arrangement until more than a year after the death of the mother, when the grantee repudiated it, the other heirs may compel a conveyance by him to them of their respective shares: *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067.

In other decisions, however, the courts have failed to recognize the existence of constructive trusts in similar cases. So where a woman buys a lot and builds a residence thereon under an oral

agreement with her son that he shall enter into possession with his family and live with her on the premises and have the title thereto after her death, provided he would pay taxes and insurance and keep the house in good repair and furnish her with all necessary care, board and lodging during life, which he does, no trust arises in his favor: *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300. Where a person at the time of buying land made an oral declaration that he purchased it for his son, and his son was in exclusive possession during his lifetime, and after his son's death reaffirmed the trust orally in favor of his son's children who were not, however, in possession, the children cannot enforce the trust as against the devisees of the purchaser: *Sherley v. Sherley*, 97 Ky. 512, 31 S. W. 275. Also, *Smith v. Williams*, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130. Where land is conveyed without consideration to a man under a verbal trust to hold for his children, in an action to enforce the trust parol evidence thereof cannot be received to establish it: *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. 11. Where land was conveyed to a father and mother without consideration under an oral trust that the remainder in one-third should be conveyed to a certain son of theirs, reserving a life estate to themselves, but in violation of the trust the spouses conveyed the whole land to certain other persons without consideration, a court of equity will not enforce the trust: *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608. A verbal agreement between two sisters at the time of purchasing a homestead that they would hold it for the use of their mother during her life, created no enforceable trust: *Wormald's Guardian v. Heinze*, 28 Ky. Law Rep. 1022, 90 S. W. 1064. Where a son conveyed land to his father by absolute deed and immediately afterward orally declared a trust therein in favor of one of his brothers to whom he was largely indebted, no trust was created therein which could be enforced against the grantee's heirs, nor would the fact that the trust was declared at the instance of certain of the heirs bind such heirs: *Bartlett v. Bartlett*, 14 Gray, 277.

C. *Guardian and Ward*.—While it is said in some decisions that constructive fraud is assumed in case of dealings between guardian and ward, warranting the interposition of a court of equity (*McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion 181 N. Y. 581, 74 N. E. 1119; *Blount v. Carroway*, 67 N. C. 396. Compare, also, *Kisler v. Kisler*, 2 Watts, 323, 27 Am. Dec. 308), yet in *Rogers v. Simmons*, 55 Ill. 76, where a person represented to the owner of certain lands that he desired to purchase them as guardian for certain minors, and the owner accordingly sold them to him at a reduced price, the court held that a trust could not be enforced in the minor's favor.

D. *Brothers or Sisters*.—"The relationship existing between brothers is not in itself a confidential relation to which the equitable doctrine of constructive trusts is applicable": *Hamilton v. Buchanan*,

112 N. C. 463, 17 S. E. 159. Thus oral trusts existing between brothers or sisters are held not to be enforceable: *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Peterson v. Boswell*, 137 Ind. 211, 36 N. E. 845; *McClain v. McClain*, 57 Iowa, 167, 10 N. W. 333; *Loomis v. Loomis*, 60 Barb. 22.

3. **Between Priest and Parishioner.**—Where a woman conveyed land to her spiritual adviser subject to the verbal trust that if her absent son should turn up he would convey the land to the son, the son may compel the execution of the trust: *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. Supp. 208, affirmed without opinion 181 N. Y. 581, 74 N. E. 1119.

4. **Between Attorney and Client.**—It seems that there is such confidence existing between an attorney and his client, that the refusal of an attorney to execute an oral trust in lands affords ground for relief against him as a trustee *ex maleficio* on the ground of constructive fraud: *McClellan v. Grant*, 83 App. Div. 599, 82 N. Y. 208, affirmed without opinion 181 N. Y. 581, 74 N. E. 1119; *Blount v. Carroway*, 67 N. C. 396. So where an attorney bought in land at an insolvent sale under a verbal agreement with his clients to buy for their use and with money furnished by them, the *cestui que trust* may enforce the trust as against the attorney: *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513. Where a grantor gave orders to his attorneys to make a deed of certain land to his wife, and after he left their office they made the deed to a certain third person instead, adding in explanation that they did so to avoid any suspicion of the deed's being made to defraud creditors, oral evidence is admissible to show that the grantee held the land in trust for the grantor's wife to whom he had intended to grant it: *Fischbeck v. Gross*, 112 Ill. 208.

5. **Between Principal and Agent.**—Where a man employs an agent by parol to buy land, who buys it accordingly, and no part of the consideration is paid by the principal and title is taken in the agent, and there is no written agreement between the parties, the principal cannot compel the agent to convey the estate to him: *Dorsey v. Clarke*, 4 Har. & J. 551. A contrary intimation, however, is found in *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689.

6. **Between Partners.**—A parol agreement for a partnership in real estate as such cannot be shown to create a trust in land held by one of the partners under an absolute deed for the benefit of the other partners; and the fact that the parties making the agreement were at the time engaged in a mercantile partnership, does not take it out of the statute of frauds: *Bird v. Morrison*, 12 Wis. 138. So where one partner conveys land to his copartner with a covenant of warranty, parol evidence is not admissible to rebut the presumption that the estate is held by the grantee for his own use: *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66.

7. **Between Cotenants or Joint Tenants.**—Where tenants in common convey to each other certain portions of the common lands, and to one of them was conveyed a larger portion than to the other under a parol trust that the former would hold the excess of the part transferred to him over his proper share in trust for the other, such trust is unenforceable: *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429. Similarly where one joint tenant conveys land to his joint tenant with a covenant of warranty, parol evidence is not admissible to rebut the presumption that the estate is held by the grantee for his own use: *Rogers v. Ramey*, 137 Mo. 598, 39 S. W. 66. Furthermore, where one who has been a cotenant of lands which had been sold on foreclosure purchased them from the purchaser at foreclosure under a verbal trust to hold them in trust for his former cotenants as well as for himself, the trust is unenforceable: *Watson v. Watson*, 198 Pa. 234, 47 Atl. 1096.

In New York, however, in *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032, affirmed without opinion 158 N. Y. 697, 53 N. E. 1122, the court holds that the statute of frauds "does not apply where there is a trust or confidential relation with regard to the property itself, where there is a community of interest between the owners, and where the promise of one relates to the vested interests of all," and that therefore where in a suit in partition the land involved was ordered sold and it appeared to the cotenants that their interests would be prejudiced by a sale at the time ordered, and one of them offered to and did bid in the property for the benefit of the whole and coupled this offer with the suggestion that the remainder do not bid against him, which suggestion was heeded at the sale, he holds the title in trust for the other cotenants and they may enforce the trust against him.

8. **Between Debtors and Creditors.**—In most states parol evidence is always admissible to show that an absolute deed of land was taken merely as security for the performance of an obligation, and is in fact a mortgage: *Patton v. Beecher*, 62 Ala. 579; *Spies v. Price*, 91 Ala. 166, 8 South. 405; *Ruckman v. Alwood*, 71 Ill. 155; *Wright v. Gay*, 101 Ill. 233; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Barber v. Milner*, 43 Mich. 248, 5 N. W. 92; *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369; *Hodges v. Tennessee Marine & F. Ins. Co.*, 8 N. Y. 416; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 39 N. E. 584; *Appeal of Sweetzer*, 71 Pa. 264. So where an absolute deed of lands is made to grantees to indemnify them against any loss by reason of a contract of suretyship on which they were sureties, it is a mortgage, and parol evidence is admissible to show that fact and that the liability to indemnify against which the mortgage was given has been discharged without damage to the mortgagees: *Moore v. Wade*, 8 Kan. 380. Where a person acquires the legal title to the land of another through legal proceedings—first by writ of summons and

attachment, and then by writ of entry—pursuant to an understanding that he would hold the property as security for what should upon final settlement appear to be due him, parol evidence is admissible to show such understanding and that he therefore held as mortgagee: *Potter v. Kimball*, 186 Mass. 120, 71 N. E. 308.

Parol evidence is also admissible to show that an absolute transfer of land from one person was in fact intended as a mortgage of land by and in behalf of another person. Thus a sheriff's deed to a purchaser at a sheriff's sale of lands may be shown to be a mortgage by parol: *Reigard v. McNeill*, 38 Ill. 400. And where a person, pursuant to an oral agreement in that behalf, advanced the money requisite to make the first payment for land and took the title in his own name, but made such payment jointly for himself and another and took the title as security, thus in effect loaning one-half of the money paid to such other person and paying it to the vendor as the other's money, a trust in the land arose in favor of the other person: *Towle v. Wadsworth*, 147 Ill. 80, 30 N. E. 602, 35 N. E. 73. And where the purchaser of land on credit, being afraid that he would be unable to pay his notes given when due, procured another person to pay the residue of the price and take the title to the land in trust, to reconvey upon payment of the moneys advanced with interest, the latter may be compelled to reconvey as agreed: *Jones v. McDougal*, 32 Miss. 179. But where a person promises another to purchase certain land for him at foreclosure sale and to hold the title in trust for him and actually does so, but afterward refuses to reconvey, the mere fact that the purchaser agreed to buy for the other person will not convert the advances he made of his own money into a loan, and thereby indirectly create a trust: *Bourke v. Callanan*, 160 Mass. 195, 35 N. E. 460, *Allen and Knowlton, JJ.*, dissenting.

The courts have on many occasions discussed the rationale of the rule admitting parol evidence to show that an absolute deed is a mortgage. While it has sometimes been declared that this rule is a mere arbitrary exception to the statutes of frauds founded on long established usage, yet by the better opinion it is founded on the idea that the violation by the mortgagee of the oral agreement pursuant to which he holds the property is a constructive fraud, giving rise to a constructive trust. Thus in *Patton v. Beecher*, 62 Ala. 579, the court says: "The relation of debtor and creditor affords the latter so many opportunities of taking advantage of the necessities of the former, that transactions between them are narrowly watched. . . . Once a mortgage, always a mortgage, is the maxim, and however broad is the power of contracting or of disposing, restraints upon the equity of redemption, though deliberately imposed, are not tolerated. The principle cannot be violated by putting the conveyance in the form of an absolute deed. If the creditor accepts the deed on no other consideration and for no other purpose than as a

security for a debt, a case of fraud and trust is made out, which requires the interference of a court to give effect to the equity of redemption if it is denied." And in *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, the court, although with less clearness, follows the same line of reasoning.

In a few states parol evidence is not admissible to show that an absolute deed was given for security only and is in fact a mortgage (*Thomas v. McCormack*, 9 Dana, 108; *McElderry v. Shipley*, 2 Md. 25, 56 Am. Dec. 703), whether the deed was given directly from the alleged mortgagors to the alleged mortgagee (*Wolf v. Corby*, 30 Md. 356), or was given by some third person to the alleged mortgagee pursuant to an oral agreement between the alleged mortgagee and the alleged mortgagor (*Benge v. Benge* (Ky.), 23 S. W. 668). This rule is based on the ground that neither public interest nor the established principles of equity jurisprudence will allow a court of justice to admit parol evidence to show that an absolute deed was intended as a mortgage: *Thomas v. McCormack*, 9 Dana, 108.

9. *In Miscellaneous Relations.*—In conclusion a few instances may be mentioned where a constructive fraud has been declared, and one where it has been denied, which do not come within any of the particular classes of confidential relations before discussed, but where the relation of confidence seems to have been a matter of fact rather than an assumption of law.

Where a woman conveyed land to another by absolute deed without consideration, on the parol promise of the latter to reconvey after her impending marriage was accomplished, and this conveyance was urged by her betrothed husband and the person to whom she conveyed it in order to avoid the operation of the law protecting a woman's separate property owned by her at the time of her marriage, and where she resided with and was on terms of intimate confidence with such grantee, upon refusal to perform the trust, the marriage having been solemnized a court of equity will enforce the trust: *Catalani v. Catalani*, 124 Ind. 54, 19 Am. St. Rep. 73, 24 N. E. 375. So where a creditor of married people voluntarily assumed a confidential relation toward them and represented that to protect their homestead against their other creditors they should mortgage it to him and he would cause it to be sold and bought in for their benefit, and they, relying upon his representations, allowed it to be so mortgaged and sold and bought by the creditor, whereupon he repudiated his promise to hold it for their benefit, a trust by construction arises in the grantors' favor: *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18.

But where an administrator bought at execution sale land belonging to the decedent under a verbal promise to hold for the heirs and apply the rent and profits to the liquidation of the amount advanced by him, the heirs are not entitled to any relief by virtue of the promise: *Maroney v. Maroney*, 97 Iowa, 711, 66 N. W. 911.

RUTHERFORD v. RUTHERFORD.

[116 Tenn. 383, 92 S. W. 1112.]

PARTITION.—Remaindermen cannot Compel Partition or a Sale for Partition where their rights are purely contingent and it is not possible to say who are the ultimate owners of the remainder. (p. 801.)

DEVISE to Two and Their Heirs, Construction of.—If property is devised to two nieces of the testator, to have the use and benefit of property, half to each for and during their natural lives, and then to their respective heirs, to have their own half, and if either of the heirs dies without children, her share to go to the survivor or the surviving children, the children of neither has any vested interest in the property. If one should die without children, her share will go to the surviving niece. If the other should die leaving children, her interest will go to her children. If one should die without children after the death of the other who had died leaving children, the share of the one dying without children would go to the surviving children of the other. (p. 801.)

PARTITION.—Life Tenants may Have a Partition or a Sale for Partition, though it is not possible at the time to know in whom the estate in remainder will ultimately vest. (pp. 801, 802.)

PARTITION BY SALE Will not be Decreed where there are contingent remainders, unless it is made to appear that it will be for the benefit not only of the life tenant but of the whole estate. (p. 803.)

PARTITION by Sale may be Decreed not only where partition in kind cannot be made, but also where the land is so situated that partition by sale is manifestly for the advantage of the parties. (p. 803.)

PARTITION BY SALE May be Decreed where the land is so situated with respect to two lines of railway that it is to the advantage of the parties to sell it in small parcels for factory purposes, and this though there are contingent estates. (p. 803.)

PARTITION Between Life Tenants and Contingent Remaindermen.—Where there are life tenants and contingent remaindermen, partition by sale may be made by having the value of the estates for life ascertained by appraisement and paid over to the life tenants, and the balance of the proceeds paid into court and invested in permanent securities for the benefit of such persons as ultimately become entitled to the estate in possession when the contingency on which it turns shall be ascertained by the happening of the event. (p. 804.)

PARTITION—Reimbursement of Moneys Paid for Lessee's Interest.—If it becomes proper to partition property by sale, and such sale cannot be effected without first inducing persons having leasehold interests to surrender their leases, moneys paid to secure such surrender may be directed to be reimbursed out of the aggregate fund. (pp. 804, 805.)

PARTITION—Expenses of Real Estate Agents in Negotiating Sales.—If real property is directed to be partitioned by sale, and real estate agents are employed to procure purchasers, the commissions of such agents should not be directed to be paid out of the aggregate fund, but must be taken care of by those employing them. (p. 805.)

Edginton & Edginton, for the complainants.

George H. Gillham, for the defendants.

285 NEIL, J. In the year 1897 one Frederick Volmer made and published his last will and testament, which contained the following provisions:

"I give, devise, and bequeath all the residue of my property, real and personal and mixed, to my nieces, Lula D. Rutherford, wife of J. R. Rutherford, and Josephine Hampe, to their sole and separate use free from the debts, contracts, control, or marital rights of the said J. R. Rutherford, or of any of said husband either of said nieces shall have hereafter; said nieces to have the use and benefit of said property, half to each, for and during their natural lives and then to their respective heirs to have their own half.

"What I mean to say is that if either of these nieces shall die without children, the share of the one so dying shall go to the survivor or the surviving children."

The two nieces mentioned in the will are the complainants in the present bill. Mrs. Rutherford has several children, all minors. Josephine Hampe, after date of the will, intermarried with Frank O'Conner. She has no children.

Mr. Volmer left several tracts and lots of land which passed under the will; none of these, however, need be specially referred to herein except the tract of sixty-three acres lying near the city of Memphis.

Prior to the present proceeding a bill was filed by J. W. Winkler, as guardian of the children of Mrs. Rutherford, **386** against the said children and Mrs. Rutherford and Mrs. O'Conner, for certain purposes which need not be specially mentioned here. The result of that litigation, so far as concerns the present controversy, was that the children or the estate represented by them acquired free of the life estate five acres undivided, or as it is otherwise expressed in the decree of that case, five sixty-thirds of the sixty-three acres. That proceeding is not before us; we have only its results.

The original bill in the present case was filed by the two life tenants against the children of Mrs. Rutherford and their guardian, G. W. Winkler, to have the sixty-three acres sold for partition or division of proceeds.

The chancellor, after hearing evidence, accepted and confirmed an offer of twelve hundred dollars per acre for seven and one-half acres of the sixty-three acres, but in his decree

of confirmation reserved the question as to whether the sale should be treated as one under the law of partition or as a sale purely for reinvestment.

Subsequently an amended bill was filed by complainants in a double aspect treating the proceeding both as one instituted to effect a partition by means of sale and as seeking to make a sale for reinvestment. Under this bill the chancellor confirmed the sale to A. B. Nickey & Sons, the persons who had made the offer above mentioned, as a sale made for reinvestment. He held that the estate was such that the statutes concerning partition and sale for partition did not apply.

³⁸⁷ Complainants made application to have their life estate valued and paid out to them. This was declined by the chancellor. From this decree the first special appeal was prayed by complainants; subsequently another special appeal was prayed, and is now before us, but at present we shall consider only the one which we have specifically mentioned.

The question suggested turns on the point as to whether the interests were such that they could be made the subject of a sale for partition.

Of course there could be no partition or sale for partition among the remaindermen, because their rights are purely contingent. The children of Mrs. Rutherford have no vested interest in the property. It is impossible to say at this date who will be the ultimate owners of the remainder. This cannot be determined until the death of both Mrs. Rutherford and Mrs. O'Conner. If Mrs. O'Conner should die without children, leaving her sister Mrs. Rutherford surviving her, we think, under a true construction of the will, Mrs. O'Conner's half interest would go to Mrs. Rutherford. If Mrs. Rutherford should die without children her interest would go to Mrs. O'Conner. If either should die leaving children, the interest of that one would go to her children. If one should die without children after the death of the other, who had died leaving children, the share of the one so dying without children would go to the surviving children of the other. Of course it would be impossible to ³⁸⁸ partition or make sale for partition among interests so uncertain as to the person who shall ultimately take: *Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797.

But this does not prevent the life tenants from having a partition or a sale for partition. Our statutes upon the subject contemplate the existence of contingent estates which

cannot be made the subject of partition or of sale for division, and provide for the enforcement of the rights of others, notwithstanding the existence of such contingent estates. The sections of the code upon the subject of partition in kind and of sale for partition are in *pari materia*, and must be construed together.

In section 5042 of Shannon's Code, it is provided that any person entitled to a partition of premises under the preceding sections shall be equally entitled to have the premises sold for division, if they are so situated that partition cannot be made, or if they are of such a description that it would be manifestly for the advantage of the parties that they should be sold instead of partitioned.

In section 5010 the right of partition is given, along with other persons, to the holders of life estates.

In section 5020, it is provided in respect of the petition as follows: "In case any one or more of such parties or the share or quantity of interest of any of the parties be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory ³⁸⁹ devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth in such petition."

In section 5040 it is enacted that the partition is conclusive "on all parties named in the proceedings who have at the time any interest in the premises divided, as owners in fee or as tenants for years or as entitled to the reversion, remainder or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency in any will, conveyance or otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in any individual share of the premises, as tenants for years, for life, by the curtesy, or in dower."

In section 5070, referring to the subject mentioned in section 5020, it is said under the article headed: "Disposition of proceeds of sale," that: "Where any of the persons are absent from the state, are without legal representatives in this state, or are not known or named in the proceedings, the court will direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives."

It is held in *Freeman v. Freeman*, 9 Heisk. 301, that the existence of such contingent interests will not prevent a sale for division of proceeds. It was held in that case that the persons in being in whom the contingent remainder would become a vested estate, if the life estate should fall in during the pendency of the proceedings,³⁹⁰ would represent the ultimate contingent remaindermen under the theory of virtual representation: See, also, *Parker v. Peters*, 2 Tenn. Ch. 636; *Ridley v. Halliday*, 106 Tenn. 607, 82 Am. St. Rep. 902, 61 S. W. 1025, 53 L. R. A. 477.

No injury could be sustained by the contingent remaindermen, by a sale for division, because there could be no sale unless it should be made to appear that it would be for the benefit not only of the life tenants, but of the whole estate: *Reeves v. Reeves*, 11 Heisk. 669; *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386.

It is also to be observed that a sale for partition may be made not only where the land is of such a description that it cannot be partitioned in kind, but also where the land is so situated that it would be manifestly for the advantage of the parties that it should be sold instead of partitioned. In view of this principle it was held in *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386, that a tract of one thousand acres should be sold for division of proceeds rather than partitioned among four persons, because it was suitable only for mining, and the water and the timber were so located upon the land with respect to each other that it would be best that one person should own the whole tract. So in the present case, it was shown in the court below that the land was so situated in respect of its location, near two lines of railway as that it would be most advantageous to the parties that it should be sold in small parcels for factory purposes. It³⁹¹ was shown, in substance, that if it should be partitioned it could not be used to advantage. It was also shown that there was, when the proceedings were instituted, an active demand for this class of property for factory purposes, and that this demand will probably continue for a time, and should be taken advantage of.

From what has been said it is apparent that a sale for partition can be very properly made under such a state of facts as shown in this record, notwithstanding the existence of a contingent estate. The sale under such circumstances

would be really for the purpose of enabling the life tenants to obtain partition and enjoyment of their estate and for the reinvestment of such portion of the proceeds as should belong to the contingent estate.

It is provided in section 5056 of Shannon's Code that the life estate may be valued and paid over to the life tenant. We are of opinion, therefore, that the sale for division of proceeds was proper in the present case, and that the cause should be remanded to the chancery court of Shelby county to the end that the share of the two life tenants may be valued and paid out of them, and that the residue of the fund, that belonging to the contingent estate, should be kept in court and invested in permanent securities for the benefit of such person or persons as may ultimately become entitled to that estate in possession when the contingency on which it turns shall be ascertained by the happening of the event. We are of opinion that future sales in this case should be treated in the same way.

³⁹² The other special appeal referred to is based upon the following facts: The seven and one-half acres was rented as a part of thirty-three and one-half acres. In order to induce the three persons who had the land rented, John Robilio, Casone Francisco, and Brusi Guiseppa, to surrender their lease on the land, the life tenants were compelled to make an allowance of one hundred and eighty dollars on the total rents and to pay five hundred dollars in cash. They ask reimbursement for this sum out of the aggregate fund. The sale of the seven and one-half acres at twelve hundred dollars per acre was worked up by two real estate agents in Memphis, I. F. Peters and H. C. Williamson Land Investment Company. Each of these persons claim two hundred and twenty-five dollars, or an aggregate of four hundred and fifty dollars, being five per cent on the purchase price, as compensation for their services, as such real estate agents.

The complainants and the guardian ad litem consent that these two amounts should be allowed. The chancellor, however, disallowed them.

The sale was a very advantageous one. It could not have been made if the tenants had refused to surrender their lease. An effort was made to procure a surrender of the lease from them for a less sum, but this could not be effected. The alternative was then presented of paying the sum demanded

or of allowing the sale to fall through. We think there could be no doubt of the wisdom of the parties in consenting to make the payment. We think it equally clear that this should be allowed out of the aggregate fund.

We are of opinion, however, that the claim of the two ³⁹³ real estate agents should not be allowed out of the fund. That expense must be taken care of by those who employed the agents referred to.

The result is that the chancellor's decree will be modified and reversed so as to conform to the above opinion, and the cause will be remanded for further proceedings.

The cost of the appeal will be paid out of the aggregate fund.

Partition may be by Sale and a division of the proceeds in a proper case: *Gilman v. Boden*, 136 Mich. 125, 112 Am. St. Rep. 356; *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 918, and cases cited in the cross-reference note thereto. Indeed, partition by sale is a matter of right when the conditions prescribed by statute to authorize a sale are found to exist: *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929.

Partition may be Had at the Instance of a Life Tenant of common property, and the court in decreeing it may make such orders as are necessary to preserve to the remaindermen their share of the estate at the termination of the particular estate: *Fitts v. Craddock*, 144 Ala. 437, 113 Am. St. Rep. 53, and note on the partition of estates held in reversion or remainder.

The Effect of the Judgment in Partition, including its effect on the holders of contingent interests, is discussed in the note to *Carter v. White*, 101 Am. St. Rep. 864.

SAMUELSON v. STATE.

[116 Tenn. 470, 95 S. W. 1012.]

CONSTITUTIONAL LAW—Statutes, Title of, When Embraces but One Subject.—The title, "An act to prohibit traffic in nontransferable signature tickets issued by common carriers, and to require common carriers to redeem unused or partly used tickets, and to provide punishment for the violation of this act," does not embrace more than one subject, nor cover incongruous legislation. (pp. 810, 811.)

CONSTITUTIONAL LAW—Statutes, Title of, When Embraces but One Subject.—In the title, "An act to prohibit the sale of tickets

issued by common carriers save through their authorized agents, and require common carriers to redeem tickets issued by them when wholly, or partly used," two subjects are not expressed, but rather two branches, naturally and intimately allied, of the same subject. (pp. 810, 811.)

CONSTITUTIONAL LAW—Statute, Construction of.—If, in an act to prohibit the sale of tickets of common carriers except by their authorized agents, one of the sections speaks of a ticket or other evidence of the passenger's right to travel, it is evident that this latter phrase is used simply as the equivalent of ticket. (p. 811.)

CONSTITUTIONAL LAW—Carriers, Statutes Relating to Non-transferable Tickets Only.—A statute prohibiting traffic on nontransferable signature tickets issued by common carriers and sold below the standard rates, and making such traffic a misdemeanor, is not unconstitutional on the ground that it delegates to carriers authority to create a penal offense or not, as they may choose to issue or not to issue tickets of that class. (p. 814.)

CONSTITUTIONAL LAW—Carriers, Restricting Sale of Tickets to Agents of.—A state, in the exercise of its police power, may, by regulations, require carriers to sell their own tickets, either directly or through their agents, and may prohibit all other persons from making such sales. (p. 816.)

CONSTITUTIONAL LAW—Carriers—Property Rights of Original Purchasers of Tickets.—A statute prohibiting traffic in nontransferable signature passenger tickets issued and sold below a standard schedule rate is not invalid for depriving persons of property rights without due process of law. (p. 817.)

INTERSTATE COMMERCE—Statute Prohibiting Traffic in Passenger Tickets.—A statute prohibiting traffic in nontransferable passenger tickets issued for less than the standard price, though applicable to tickets for transfer from one state to another, is not invalid as interfering with interstate commerce. It does not regulate nor cast any burden on commerce, but is merely a police regulation. (p. 818.)

CARRIERS, Regulation of, When not Invalid for Vagueness.—A statute prohibiting traffic in passenger tickets sold and issued for less than standard schedule rates is not void for vagueness. (p. 819.)

STATUTE, Construction of.—The grammatical sense of the words employed in a statute is usually to be adopted, but if there is ambiguity, or room for more than one interpretation, the rules of grammar may be disregarded, if strict adherence to them will give rise to a repugnance or absurdity or defeat the purpose of the legislature. (p. 821.)

STATUTES, Construction in Favor of Constitutionality of.—If a statute admits of two constructions under one of which it must be pronounced unconstitutional and void, and the other constitutional and valid, the latter will be adopted. (p. 822.)

CARRIERS, Statutes Restricting Right to Sell Tickets of.—A statute making it unlawful for any person other than an authorized agent of a common carrier to sell or otherwise deal in nontransferable signature passenger tickets issued below the standard schedule rate is not invalid as prohibiting such sales by everyone except such agents, while permitting them to sell. The statute is not susceptible of a construction permitting sales by such agents other than the original sale by them in behalf of their employers. (p. 822.)

Lehman, Gates & Lehman and Moritz Rosenthal, for Samuelson.

Attorney General Gates, Charles N. Burch, A. W. Biggs, F. T. Edmondson and M. R. Paterson, for the state.

⁴⁷⁵ BEARD, C. J. The plaintiff in error was convicted in the criminal court of Shelby county, of a violation of chapter 410, page 873, of the Session Acts of 1905. It is agreed that the facts proven brought the offense charged within the provisions of the act, and the only question made on the record is as to its constitutionality. It is in these words:

"CHAPTER 410. SENATE BILL No. 492.

"An act to prohibit traffic in nontransferable signature tickets issued by common carriers, and to require common carriers to redeem unused or partly used tickets, and to provide punishment for the violation of this act.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that it shall be unlawful for any person, other than the authorized agent of the common carrier issuing the same, to sell, or otherwise deal in or offer to sell, any railroad, railway, steamship, or steamboat passenger ticket which shows that it was issued and sold below the standard schedule rate under contract ⁴⁷⁶ with the original purchaser entered upon such ticket and signed by the original purchaser, to the effect that such ticket is nontransferable and void in the hands of any person other than the original purchaser thereof: Provided, however, that nothing in this act shall be construed as depriving the original purchaser of a transferable ticket of a right to sell same to a person who will in good faith personally use it in the prosecution of a journey.

"Sec. 2. Be it further enacted, that it shall be the duty of every common carrier that shall have sold any ticket or other evidence of the purchaser's right to travel on its line (or any line of which it form a part), to, if the whole of such ticket be unused, redeem the same, paying the original purchaser thereof the actual amount for which said ticket was sold; or, if any part of such ticket be unused, to redeem such unused part, paying the original purchaser thereof at a rate which shall be equal to the difference between the price paid for the whole ticket and the price of a ticket between the

points for which said ticket was actually used; provided, such purchaser shall preserve such unused or partly used ticket for redemption within six (6) months after the date of its issuance, to the officer or agent who shall be authorized or designated by such common carrier to redeem unused or partly used tickets, and the said officer shall, within fifteen (15) days after the receipt of said ticket, redeem the same as hereinbefore provided for. Such redemption ⁴⁷⁷ shall be made without cost of exchange or other expense to the purchaser of the ticket.

"Sec. 3. Be it further enacted, that any person or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and shall, upon conviction thereof, be punished by fine in the sum of not less than fifty (\$50) dollars, nor more than one hundred (\$100) dollars.

"Sec. 4. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

"Passed April 13, 1905.

"E. RICE,

"Speaker of the Senate.

"W. K. ABERNATHY,

"Speaker of the House of Representatives.

"Approved April 14, 1905:

"JOHN I. COX,

"JOHN I. COX,

"Governor."

The first objection made by the plaintiff in error is that this statute violates so much of section 17 of article 2 of our state constitution as provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The purpose of this provision is well understood by the profession. Log-rolling among legislators, followed often by incongruous statutes, grew to be a flagrant evil. Under that system it was altogether possible, by adroit management, for a vicious section to be concealed in a multitude of sound provisions, under an innocent, meaningless ⁴⁷⁸ caption, and thus become enacted into law without attracting the attention of a large part of the members of the legislature, or of the public. It was to root out this evil practice, through which such baneful results might be accomplished, that this constitutional provision was adopted.

The leading case in this state, and the one in which the clause was examined and proper limitations imposed upon it, is that of *Cannon v. Mathes*, 8 Heisk. 504. Later cases have been but an application of the principle therein announced. The statute in question in that case was entitled "An act to fix the state tax on property," and it contained a section providing for a tax on "privileges." The insistence was that, inasmuch as "privileges" were not "property," there was such incongruity in the act as made it obnoxious to this constitutional requirement.

In meeting the argument on which this insistence rested, after quoting with approval from the text of Judge Cooley, in his work on Constitutional Limitations, that "the generality of a title is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection," the opinion proceeded to make clear that the act embraced but one subject, that of raising of state revenue by taxation on property and privileges, and this subject was expressed in the title. In concluding, the court, rejecting the narrowness of interpretation, which would ⁴⁷⁹ seriously hamper legislation, deduced from the authorities this general rule: "Any provision of the act directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith and not foreign thereto, should be held embraced in it."

The rule announced by Chief Justice Nicholson in that case has been later applied by this court on many occasions. In *Frazier v. East Tennessee etc. Ry. Co.*, 88 Tenn. 138, 12 S. W. 537, it was held that the title, "An act to amend the law in relation to the consolidation of railways," naturally embraced a provision that "no railroad company shall have power under this act or any of the laws of this state to give or create any mortgage . . . which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this state."

In *Ryan v. Louisville etc. Terminal Co.*, 102 Tenn. 111, 50 S. W. 774, 45 L. R. A. 303, a statute which, under the title of "An act to amend an act entitled 'An act to pro-

vide for an organization of railroad terminal corporations, and to define the powers, duties and liabilities thereof," "enacted, inter alia, that a railroad company contracting for use of the facilities of a terminal company shall have power to own stock and bonds of such terminal company and to guarantee its bonds and other contracts, was held not to be violative of the constitution as grouping foreign or incongruous matter under the title.

⁴⁸⁰ Among the many cases which have recognized the essential wisdom of the liberal rule of construction, as announced in *Cannon v. Mathes*, 8 Heisk. 504, and have applied it to the saving of different statutes, attacked on like ground with the present, are *Luehrman v. Taxing Dist.*, 2 Lea, 425; *State v. Fickle*, 3 Lea, 79; *Ex parte Griffin*, 88 Tenn. 547, 13 S. W. 75; *Cole Mfg. Co. v. Falls*, 90 Tenn. 469, 16 S. W. 1045; *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

Coming now, in the light of these cases, to the act in question, does it, either in title or body, cover incongruous legislation? Its evident purpose is to regulate the issuance, sale and redemption of tickets sold by common carriers as evidences of the rights of purchasers to pass over the routes of travel covered by the tickets. For reasons satisfactory to itself, the legislature, in the matter of regulation, saw proper to prohibit the dealing in nontransferable signature tickets, issued and sold by the common carrier to original purchasers below the standard schedule rate, by any other person than the authorized agent of the carrier. Assuming, for the moment, that this legislation is within the police power of the state, then it seems to us there is no necessary incongruity between it and a provision requiring the carrier to redeem all tickets sold by him where they have been wholly or in part unused. To the contrary, we think there is a natural connection between the two. In the statute, the legislature in effect says to the common carrier: We concede that it is a wise and proper thing to ⁴⁸¹ protect you, and indirectly the public by absolutely breaking up this system of general or indiscriminate dealing in tickets which have been sold to original purchasers at reduced rates, and upon signed agreements that they were not transferable; but this relief is given upon the condition that you promptly redeem all

tickets sold by you which are unused in whole or in part. We see no reason why such legislation should be held void, when the statute in question in the Frazier case (88 Tenn. 138, 12 S. W. 537), in the Ryan case (102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303), and other cases referred to, have been maintained as a constitutional exercise of legislative power.

If the caption had been "An act to regulate the sale and redemption of tickets by common carriers," we think it would hardly be insisted that the redemption of tickets was so foreign to their sale that both could not be embraced in the same act. Or, if the act had been entitled, "An act to prohibit all traffic in tickets issued by common carriers, save through their authorized agents, and to require common carriers to redeem all tickets issued by them, when wholly or in part unused," could it be maintained that an act framed in accordance with this caption was violative of the clause of the constitution we are now considering? We think not. If not, it is because neither caption nor body of the act would embrace two subjects, but rather two branches, naturally and intimately allied, of the same subject.

Neither is this contention of the plaintiff in error strengthened, nor the argument contra weakened, by the ⁴⁸² coupling with the word "ticket" of the phrase "or other evidence of the purchaser's right to travel on its line" in the second section of the act. Even without the aid of the rule of ejusdem generis it is clear the phrase, while ampler, is used simply as the equivalent of "ticket"—of something purchased which gives the holder the right of travel, and is therefore within the authority of *Cannon v. Mathes*, 8 Heisk. 504. In addition, a reading of section 2 discloses that, notwithstanding the use of this phrase and its association, yet, when redemption is provided for, it is only the "ticket" which is included. In either view we are satisfied the provision for redemption is within the title of the act.

This being entirely clear to us, we are unable to see why the present act is not constitutional, so far as this objection is concerned. It is true that the inhibition extends only to nontransferable signature tickets, while the duty of redemption is laid on the carrier as to all tickets which are wholly or in part unused; but we cannot see how the narrowness of the inhibitory clause will make two subjects alien to one an-

other of that which would be otherwise germane and entirely congruous; nor do we believe so anomalous a result follows.

Many cases which, it is assumed, present a different view of this constitutional clause, have been pressed upon us in the very learned briefs of the several counsel of the plaintiff in error. Among those are *Murphy v. State*, 9 Lea, 373, *State v. McCann*, 4 Lea, 1, *Bank v. Divine G. Co.*, 97 Tenn. 603, 37 S. W. 390, *Saunders v. Savage*, ⁴⁸³ 108 Tenn. 340, 67 S. W. 471, *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; and *State v. Hayes*, 116 Tenn. 40, 93 S. W. 98.

No question is made, nor is any doubt entertained by us, of the soundness of the conclusions reached by the court in the several cases. All of these, however, we think, are clearly to be distinguished from those upon the authority of which we place our holding in the present case. *State v. Gerst*, supra, involved a statute with the most restricted caption, embracing, however, provisions extending far beyond the limits of the caption, and having no natural connection with it. So it was in the other cases referred to by plaintiff in error; each was decided upon the distinctive features of the act there in question. After all it is to be remembered, as was said in *Frazier v. East Tennessee Ry. Co.*, 88 Tenn. 138, 12 S. W. 537: "The subjects of legislation are infinite. The determination as to whether the several provisions of an act are congruous and germane becomes largely a question of fact. Particular decisions cannot often be controlling in determination of subsequent cases arising out of this constitutional provision." We repeat here the language used in *Ryan v. Louisville etc. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303: "As each case is presented, the courts are bound to examine the act in question as a whole, and applying to it the sound rule of construction announced in *Cannon v. Mathes*, 8 Heisk. 504, and their 'own knowledge of affairs' (*Frazier v. East Tennessee Ry. Co.*, 88 Tenn. 138, 12 S. W. 537), determine whether its provisions are congruous or not."

⁴⁸⁴ Again, it is contended that the act is unconstitutional because it is assumed it delegates to the common carrier the power to suspend or put in force its provisions at pleasure. We take it that this contention involves the idea that the statute in effect delegates to the common carrier legislative authority to create, or not, a penal offense by the issuance or

nonissuance of nontransferable tickets to the original purchaser below the standard rate schedule. This objection is necessarily addressed to that part of our constitution which vests the legislative power of the state in the general assembly.

Is this contention sound? Does the statute delegate the power to the common carrier, at his pleasure, to create a penal offense? Upon its face, and as it came from the hands of the legislature, it seems to be complete legislation. It defines the offense and fixes the penalty. It is true it is not self-executing, nor does it come into active operation until the condition arises contemplated by its terms. The common carrier is not bound to issue a nontransferable signature ticket, nor is any person obligated to purchase such ticket. But when the carrier does issue this ticket, and a signature purchaser is found for it, then a contract relation has been created, out of the violation of which an offense against the statute results. It is to be observed, however, that it is neither in the issuance nor original purchase that the penalty is incurred. Both these are innocent acts. It is only after these things have been done, after the control of the common ⁴⁸⁵ carrier over the ticket has temporarily ended, that the penalty is incurred, if incurred at all.

This is by no means the only law on our books which, seemingly perfect when passed, becomes effectual to punish, when through agencies not in existence at its passage and altogether voluntary in their subsequent actions is aroused to activity. Take the case of the four-mile law, which makes it unlawful to sell liquor within four miles of a schoolhouse, public or private, whether school be in session or not. This legislation was directed, not only to conditions then in existence, but to similar conditions which might arise thereafter. So it was possible for a person to make unlawful the sale of liquor by establishing a school within four miles of a place where one was then and had been before engaged in its lawful sale. Yet we have not heard it insisted that this option to make unlawful what was before lawful invalidated this wise and wholesome statute, in that it was a delegation of legislative authority to the one exercising this option.

As another illustration of the same species of legislation, we have the statute regulating conditional sales of personal

property (Acts 1899, cc. 12, 15, pp. 19, 24), by which it is made a misdemeanor for a purchaser to dispose of the property bought by him until it is paid for, provided the seller has retained the title in a written or printed contract of sale, but it is not misdemeanor if the title has been retained in parol. If the argument of the counsel for plaintiff in error is correct, ⁴⁸⁶ then it would be impossible to sustain this act, yet we have not known of its constitutionality being called in question.

We think the argument on which this contention rests unsound. The carrier, by the terms of the statute, is neither delegated the power to make the law, nor the offense. The law was made, and the offense was defined, by the legislature. The mere fact that it is within the power of parties of their own volition to create a condition from which a penalty might arise or be incurred did not affect the statute. The true distinction, said the supreme court of Ohio, in *Cincinnati etc. R. Co. v. Clinton Co.*, 1 Ohio St. 77, "is between the delegation of power to make a law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." So, in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, it is said: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact, or state of things, upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government."

This phase of the question underwent examination and the conclusion of the court with regard to it was supported by a full citation of authorities in *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468, 60 S. W. 1077, 54 L. R. A. 950. ⁴⁸⁷ The statute in question was one regulating book-making and pool-selling in the state of Missouri, and it forbade the doing of either of these things without license, but provided that any one of good character might apply to the state auditor for a license to sell pools, make books, etc., who, after being satisfied of the good character of the applicant and good repute of the racecourse, etc., upon which the applicant desired to do business, might issue a license authorizing to do these things. The insistence there was that this

statute was unconstitutional, in that it delegated legislative power to a state officer. This view, however, was rejected by the court, which held that it was rather a delegation of determining power, and as such within the competency of the legislature. In support of its conclusion, many cases were referred to, among these being *State v. Barringer*, 110 N. C. 525, 14 S. E. 781; *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *Commonwealth v. Davis*, 140 Mass. 485, 4 N. E. 577; *In re Nightingale*, 11 Pick. (Mass.) 168; *Commissioners v. Covey*, 74 Md. 262, 22 Atl. 266; *In re Flaherty*, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529. To these may be added the case of *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684.

To sustain his contention the plaintiff in error, through counsel, refers to *Jannin v. State*, 42 Tex. Cr. Rep., 631, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419, and *Allardt v. People*, 197 Ill. 501, 64 N. E. 533. We have examined these cases, and, while they give ⁴⁸⁸ strong support to this contention, we are not satisfied to follow them, believing that the weight of authority and—with great respect for the learned courts deciding them—of correct reasoning is against them.

It is further said that the statute is vicious class legislation in violation of section 8, article 11, of the state constitution, in that it suspends a general law for the benefit of the common carrier. This objection may be considered in connection with the question whether the legislation is a proper exercise of police power by the state. In a very extensive and valuable note by Mr. Freeman to the case of *Jannin v. State*, 42 Tex. Cr. Rep. 631, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419, there will be found a discussion of these questions and a full citation of the cases. With regard to this last question Mr. Freeman says that, whenever it has "been presented to the courts for decision, it has been almost uniformly decided that it is a reasonable and proper exercise of the state police power by the legislature when seeking to put an end to frauds in the sale of passage tickets to require carriers, who are usually created by legislation, to sell their own tickets, either directly or through duly authorized agents. . . . The courts generally hold that the legislature, in the constitutional exercise of police power, has a right to say to the common carrier, so as to bind him: 'You must select and duly commission the agents who are to

sell your passage tickets, and no one else shall engage in that business.' And it has a right to say to all other persons: ⁴⁸⁹ 'You shall not, without incurring a penalty, engage in buying and selling passage tickets unless authorized so to do.' This is the effect of the decisions in the following cases: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948, 24 L. R. A. 152; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Commonwealth v. Wilson*, 14 Phila. (Pa.) 348; *Commonwealth v. Keary*, 198 Pa. 500, 48 Atl. 472." In *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498, the court said: That "the transportation of passengers is a proper subject for police regulation by the state is unquestioned, and, if a business itself is a subject of police regulation, then so are its incidents and accessories. That the matter of the issue and transfer of tickets as evidence of the contracts of carriers is an incident and accessory of the business needs no argument. And where a business is a proper subject of a police power, the legislature may in the exercise of that power adopt any measures not in conflict with the provision of the constitution that he sees fit, provided only they are such as have some relation to and some tendency to accomplish the desired end." And why is not such regulation properly exercised under the police power? In the case of *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. 933, it is said: "Any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, . . . is a legitimate subject for regulation or prohibition by the ⁴⁹⁰ state." That the sale as well as the purchase of non-transferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion among the courts. This being so, an answer is furnished to the other branch of the contention, to wit, that the act is unconstitutional, because class legislation. For, if repressing the traffic is a proper exercise of police power, then the objection does not lie that it is arbitrary or class legislation. And such is the view of all the courts, save those of New York, and, as we understand, the judgments of those courts are rested upon statutes which, as construed by them, distinguish them

from our act of 1905, and similar acts construed by the various courts to whose opinions we have referred.

Again, it is contended that the effect of this statute is to deprive a party of a property right without due process of law. The courts generally, if not entirely, agree in holding, as to the character of a passage ticket, with the dissenting judges, Bartlett and Martin, in *People v. Warden of City Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006, 43 L. R. A. 264, that it is not property, nor is it to be treated as property in its general sense, but as a simple token of the purchaser's right to be transported on the railroad between the points named on the ticket, and when it has served its purpose to be delivered to the carrier issuing it. This was the view taken in *O'Rourke v. Street Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 615. So it is the courts have held that the sale of ⁴⁹¹ such tickets by persons other than the carrier or his agents, as a business, is not an employment in which they have an unqualified right to engage. If it be true that the ticket is a mere incident to the business of the carrier in transporting his passengers, possessing none of the ordinary elements of property, then it follows that without the consent of the carrier, dealing in these tickets cannot form the basis of a legitimate independent business. As is said by Mr. Freeman in the note referred to: "Third persons have no constitutional right to interfere with the relations between the carrier and the passenger by the purchase and sale, without its consent, of tickets issued by the former. Hence statutes which confine the purchase or sale of such tickets to the carrier, or his authorized agent, can in no way deprive a third person of his property without due process of law, nor deny to him the equal protection of the law." The same authorities which are cited by Mr. Freeman in his discussion of the question of the exercise of police power and class legislation involved in such acts are cited by him to the proposition above, with the addition of *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68, 50 L. R. A. 55. The state of New York stands alone in maintaining a contrary rule.

It is also insisted that, inasmuch as the ticket, for dealing in which the indictment in this case was found, was one issued for passage from Tennessee into another state, the effect

of the application of the statute to this case was an unwarranted interference with interstate ⁴⁹² commerce. In *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498, this objection is answered in this wise: "The law is not a revenue law, and is not designed to and does not regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate commerce, is purely incidental and accidental." Again, in *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238, the court said: "It cannot be said, we think, that the statute of this state, above quoted. in any manner impedes, obstructs, or casts any burden upon the free course of commerce, is so far as interstate passenger travel is concerned. The statute imposes certain prescribed duties upon common carriers of passengers and their agents; but the discharge of these duties does not and cannot, as it seems to us, obstruct, or change, or cast any burden upon the commerce of the country or interstate passenger travel."

We think this view is eminently sound, and certainly it is abundantly supported by authority.

Again, it is contended the statute must fall because of vagueness, and therein is a fatal omission in fixing a 'standard schedule rate' in reference to which nontransferable signature tickets are sold. The argument is that one jury might find one rate to be the standard schedule rate, while another might find another rate. If this be true, then the statute must fall, for the authorities all seem to hold that, where the statute in question is so indeterminate as to leave juries with their varying opinions to settle the standard, the statute will ⁴⁹³ not be enforced. In *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129, 33 L. R. A. 209, a statute providing that, if any railroad corporation shall charge or collect more than a just and reasonable rate of toll for the transportation of passengers or freight, it shall be guilty of extortion, and fixing a penalty therefor, was held void for uncertainty, in that it failed to prescribe a standard as to what is just and reasonable by which the carrier could regulate its conduct. In *Cook v. State* (Ind. App.), 59 N. E. 489, it was held that a statute which made it an offense to haul over turnpikes and gravel roads, in specified weather, loads of more than two thousand pounds in narrow-tired wagons, or of more than two thousand

five hundred pounds in broad-tired wagons, was void for uncertainty, because it failed to provide a standard by which broad or narrow tires might be determined. In line with these cases are *Matthews v. Murphy*, 23 Ky. Law Rep. 750, 63 S. W. 785, 54 L. R. A. 415, *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237, *Ex parte Jackson*, 45 Ark. 158, and other cases relied on by plaintiff in error.

But is the expression "standard schedule rate" vague and uncertain, so as to fall under the condemnation of these cases? We think not. So far as interstate commerce travel is concerned, section 6 of the interstate commerce act provides for it by requiring every common carrier, subject to the provisions of the act, to print and keep open to public inspection schedules showing the rates, fares, and charges for the transportation of passengers ⁴⁹⁴ and property which any such common carrier has established, and which are in force at the time on its route. This section also provides that these printed schedules shall plainly state the places upon its railroad between which property and passengers will be carried, and these schedules are to be plainly printed in large type copies for the use of the public, and shall be posted in two conspicuous places in every depot, station, or office of the common carrier where passengers or freight are received for transportation. There is a similar provision as to joint rates over one or more connecting roads. In addition, the act provides that "every common carrier subject to the provisions of this act, shall file with the commission . . . copies of its schedule of rates, fares and charges which have been established and published in compliance with the requirements" of the act, and shall notify the commission of all changes made in the same. When these rates, fares and charges have been established by the common carrier, the act provides: "It shall be unlawful for such carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property . . . than is specified in such published schedules of rates, fares, and charges as may at the time be in force."

After thus providing for the establishing and publication of rates, etc., and against all manner of discrimination in reference thereto, the last section of the act is as follows: "Nothing in this act shall prevent . . . ⁴⁹⁵ the issuance of mileage, excursion or commutation passenger tickets."

So we think there is no uncertainty in fact in the matter of interstate travel as to what is, at any particular time, the standard schedule rate for the sale of passenger tickets, and when chapter 410 speaks of tickets being sold below that rate it refers to the standard established and made public under this act of Congress.

Nor is there any more uncertainty as to intrapassenger rates. So far as railroads are concerned, these are provided for in chapter 10, page 121, of our Session Acts of 1897. By section 22 of that act it is made the duty of all persons or corporations who shall own or operate a railroad in this state, within thirty days after the passage of the act, to furnish to the railroad commission created by the act its tariff of charges of every kind for examination and correction, and when corrected the commission was required to append a certificate of approval to this tariff of charges, and it was then made the duty of the railroad company, or its operators, to post at each of its depots in conspicuous places the rates, schedules, and tariffs for transportation of passengers and of freight.

But it is earnestly argued, though not made the subject of an assignment of error, that, whatever may have been the purpose of the draftsman of this act, yet its effect is to make it unlawful in every one, save the authorized agents of common carriers, to be engaged as ticket brokers, and possible to continue the ticket broker's ⁴⁹⁸ business as a lawful avocation when carried on by these agents. To put the objection, which it is assumed to be fatal to the act, in the words of counsel: "It makes it unlawful for any persons, including the original purchaser, to sell, etc., tickets of a certain character, and punishes a violation of the act by a heavy fine, while it permits the authorized agent of the common carrier issuing the tickets to violate the act at will." It is very clear from the language used that the sale of or dealing in railway and other tickets by the authorized agent of the common carrier issuing the same, which is made innocent by the act, though punishable when done by any other person, is not the original sale, but is a resale of the ticket after it has left the hands of the railway company and has passed into the hands of the original purchaser for a subsequent purchaser. This is beyond question, for the language, in de-

scribing the ticket whose sale is prohibited, is: "As which shows that it was issued and sold below the standard schedule rate under contract with original purchaser entered upon such ticket and signed by the original purchaser."

As will be seen, this construction is reached largely from the use of the phrase "issued and sold" in the past tense. In other words, the construction insisted upon is arrived at by adhering to the true grammatical effect of those words, making them have reference to a past transaction.

This, however, is to single out a single phrase and give it such controlling force as to warp the entire act, when ⁴⁹⁷ in the argument of counsel it is admitted that "there can, of course, be no doubt that the purpose of this act is to destroy the business of ticket brokers." We know of no sound canon of construction which would warrant this. While it is true that, in arriving at the meaning of the legislature, primarily, the grammatical sense of the words used is to be adopted, yet if there is any ambiguity, or if there is room for more than one interpretation, the rules of grammar will be disregarded where a too strict adherence to them would raise a repugnance or absurdity, or would defeat the purpose of the legislature: *Garby v. Harris*, 7 Ex. 591; *Metropolitan B. Wks. v. Steed*, L. R. 8 Q. B. D. 445; *George v. Board of Education*, 33 Ga. 344; *State v. Heman*, 70 Mo. 441. Many cases might be cited in which the future tense has been read as including the present and the past, where that was necessary to carry out the meaning of the legislature. Thus an enabling act relating to married women who "shall come into the state" may apply to one who came into the state before the passage of the law: *Maysville & L. L. R. Co. v. Herick*, 13 Bush (Ky.), 122. Where an act provided that certain land "shall be allotted for and given to" an individual named, it was held that the words passed an immediate interest: *Rutherford v. Green*, 2 Wheat. (U. S.) 196, 4 L. ed. 218. In *Babcock v. Goodrich*, 47 Cal. 488, the phrase "current expenses of the year" was made to read, "expenses of the current year"; it being evident that the latter form of words more correctly ⁴⁹⁸ expressed the legislative intent. These cases are but a recognition of an old and well-established rule of the common law, applicable to all written instruments, that "verba intentioni, non e contra, debent in-

serve"; that is to say, words ought to be more subservient to the intent, and not the intent to the words: Black on Interpretation of Laws, sec. 34.

It will be found that this court has had occasion frequently to apply this rule of construction. One phase of the rule has been used for the purpose of saving statutes, the constitutionality of which was called in question. In such cases it has been held that where a statute will admit of two constructions, one that would make the statute void on account of conflict with the constitution, and another that would render it valid, the latter will be adopted, even though the former at first view be the more natural interpretation of the language used: *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

We agree with the counsel that there is no doubt that the legislature intended by this act to destroy the business of ticket brokers, and to so construe it as to make it possible for common carriers, or their authorized agents, to engage in this business, would do violence to this intention. We do not think that there is any rule which demands a construction leading to this result. To the contrary, we are satisfied, giving the terms used a natural construction, that the act means, in the words of the ⁴⁹⁹ counsel for the state, "that common carriers and their authorized agents can sell to an original purchaser a contract signature ticket, and that the common carrier, through its agent, can repurchase by redemption such ticket so originally sold, and that the extent to which it authorizes common carriers and their agents to traffic in non-transferable signature tickets is in the original sale and in the redemption."

We are satisfied, after considering the many objections urged to this act, that no one of them is well taken. We think it is in no respect violative of the state or federal constitutions. It follows, therefore, that the judgment of the lower court is affirmed.

The Constitutional Requirements as to the Title of Statutes are considered at length in the notes to *Crookston v. County Commissioners*, 79 Am. St. Rep. 456; *Bobel v. People*, 64 Am. St. Rep. 70; *Lewis v. Dunne*, 86 Am. St. Rep. 267.

The Power of a State to Control the Sale of Passenger Tickets is the subject of a note to *Jannin v. State*, 96 Am. St. Rep. 828.

THOMPSON v. FIDELITY MUTUAL LIFE INSURANCE
COMPANY.

[116 Tenn. 557, 92 S. W. 1098.]

INSURANCE, LIFE—Course of Dealing Justifying Belief that the Insurer will not Insist upon a Forfeiture for Nonpayment of Premium.—The fact that out of thirty-six premiums paid seven were accepted after due, two of which were accepted after the assured presented a certificate of continued good health, two were forwarded by mail on the day they were due, and of the other three, one being paid one day overdue, another two days overdue, and the remaining one being mailed one day overdue, but not received until four days later, does not justify the insured in believing that the insurer will not insist on a forfeiture of the policy if subsequent premiums are not paid as they fall due. (pp. 825, 826.)

INSURANCE, LIFE.—Mere Indulgence in the Payment of Premiums does not constitute a waiver of a condition of forfeiture for the failure to pay premiums when due. (p. 826.)

INSURANCE, LIFE.—To Warrant a Recovery Where a Premium is not Paid When Due, it is necessary to prove (1) the course of dealing between the insured and the insurer in reference to the acceptance of overdue payments amounting to a custom or habit; (2) that by reason of this course of dealing, the insured was justified in believing that the insurer would not insist on a forfeiture for failing to pay subsequent premiums; (3) that the assured believed he could postpone the payment of premiums without risking a forfeiture; and (4) that he acted on this belief, and therefore, did not pay the premium at its maturity. (p. 827.)

INSURANCE, LIFE.—Tender of Premiums After Death of the Assured.—The permission to pay a premium after due during the life and good health of the assured is not equivalent to paying a premium after his death or loss of health. (pp. 827, 828.)

INSURANCE, LIFE.—The Illness of the Assured is No Excuse for not Paying His Premium when it falls due. (p. 828.)

INSURANCE, LIFE.—The Failure to Pay a Premium when due works a forfeiture, whether the condition requiring such a payment be regarded as precedent or subsequent. (p. 830.)

INSURANCE, LIFE.—Incontestable Clause Does not Apply to Nonpayment of Premiums.—A policy providing that after three years, if the payments required shall have been made when due, it shall be incontestable, means incontestable for causes other than nonpayment of premiums, and an insured failing to pay a quarterly premium after such three years is not entitled to recover. (p. 831.)

Turley & Turley, for Thompson.

R. Lee Battels, for Insurance Company.

560 WILKES, J. This is a suit to collect a life insurance policy. The bill upon its face shows that the insured died in default of payment of the last premium. The complainant

seeks to recover upon two theories, one that there was a course of dealing between the insured and the company, by which the insured was allowed to pay his premiums after they became due, and in consequence of this course of dealing complainant was led to believe that he might make such payments within thirty days after they became due.

The last payment which was allowed to go by default was due December 30, 1904. The insured was then absent from his home at Memphis, and in his last sickness; but of this the company had no notice.

The company mailed notice in due time and in the usual way of the maturity of this premium, but it was never received by Thompson or his wife, or any one else for him, so far as the record shows.

The policy provides as follows:

"The Fidelity Mutual Life Association . . . in consideration of the application for this policy, which is made a part hereof . . . and the payment to said association of seven and eighty-three one-hundredths dollars (\$7.83) upon the thirtieth days of the months of March, June, September, and December in every year, for a period of twenty years from March 30, 1896, and thereafter in the event of the continuance of this contract, ⁵⁶¹ the payment of renewal premiums on the date aforesaid . . . does hereby receive William Y. Thompson, of Memphis, Tennessee, as a member of said association, and issues this policy of insurance and hereby promises to pay the sum of twenty-five hundred dollars to the administrators, executors or assigns of said member within ninety days after proof of death, . . . less the balance of the dues for the current year of the death of the insured, and any indebtedness of the member to said association, subject, however, to all the requirements hereafter stated, and the conditions herein indorsed, which are hereby referred to and made a material part of this contract.

"(2) Provided, any moneys required to be paid under this policy, during the continuance of this contract, must be actually paid when due to said association; . . . otherwise, this policy shall be ipso facto null and void, and all moneys paid thereon shall be forfeited to the said association."

The policy was issued on the 30th of March, 1896, and delivered to the insured on April 3, 1896, at which time he paid the initial premium. The insured died on the 14th of January, 1905, in default in the payment of the premium due

December 30, 1904. On a day between January 20 and 23, 1905, a tender of the premium due December 30, 1904, was made to the Nashville office of the defendant. At that time the company was not aware that Thompson had died, and that fact was not communicated ⁵⁶² to it at the time of tender. The agent in charge at the Nashville office advised the party making the tender that it could not be accepted because it was overdue, unless accompanied by a certificate of good health.

At the time the policy was issued the insurer had an office in Memphis, but during the summer of 1900 this office was abolished, and the insured was instructed to pay his premiums by mail to the Nashville office. The subsequent premiums were paid to the Nashville office.

There were thirty-six premiums due upon the policy between the date of its issuance and the death of the insured. Of these, seven were accepted after they were due. Of these seven, two were accepted only when the insured had executed a certificate of good health. Of the five remaining premiums, two were forwarded by mail to the Nashville office on the day they became due, thus leaving only three premiums that were paid and accepted after due, unconditionally. Of these three premiums one was paid one day overdue, one two days overdue, and one sent by mail to the home office one day after due, and received five days after due.

The evidence shows that the certificates of health executed by Thompson and the revival contracts recited that the policy had become forfeited for nonpayment of premiums at maturity, and there was an express agreement on the part of the insured that he was to pay his future premiums promptly. The correspondence ⁵⁶³ that passed between the cashier of the Nashville office and the insured in reference to the premium due December 30, 1900, shows that it was necessary, in order to protect Thompson's insurance, that the cashier should pay his premiums on the due date, out of her own funds. The subsequent correspondence between the cashier of the same office and Thompson, in reference to the premium due June 30, 1901, made known to Thompson that his policy had been forfeited because his premium was not paid promptly, and that before he could be reinstated it was necessary for him to execute a health certificate.

We cannot, in view of the evidence in regard to the payment of premiums which we find in the record, conclude that there was an habitual course of dealing between the

parties which would justify the insured in believing that the company would not insist upon a forfeiture of the policy if he failed to pay his premiums when they fell due, so as to bring the case within the operation of the rule laid down in *Hartford Ins. Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968; *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.

The doctrine is there laid down that any agreement, declaration or course of dealing on the part of an insurance company which leads the insured honestly to believe that by conformity thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting ⁵⁶⁴ upon a forfeiture, though it may be claimed under the express letter of the contract.

As was said by the court in case of *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365: "The course of dealing between the insured and the insurer must be such as to justify the insured in believing that the company will not insist upon a forfeiture of the contract for his failure to pay his future premiums when due; that the insured does believe this and that he acts on this belief. Otherwise, there is no estoppel on the part of the insurer to insist upon prompt payment and forfeiture for failure to pay *ad diem*."

The rule is laid down by Mr. Bacon, Mr. Joyce and other text-writers that the "course of dealing" between the insured and the insurer as to accepting overdue premiums must amount to a custom or habit in order to estop the insurer from insisting on forfeiture for the failure to pay a subsequent premium *ad diem*; and that not only must it be shown that the premiums were habitually received after they were due, but that the insurer intended to waive the prompt payment of future premiums, or that the assured, as a reasonable man, was led to believe by its action, that the insurer had waived the condition of forfeiture: 2 Bacon, sec. 431; 2 Joyce, sec. 1368; Vance, p. 353; *Crossman v. Massachusetts B. Assn.*, 143 Mass. 435, 9 N. E. 753.

That mere indulgencies in the payment of premiums do not constitute a waiver of the condition of forfeiture for failure to pay premiums when due: *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252, 26 L. ed. 765; *Easley v. Valley Mut. Life Assn.*, 91 Va. 169, 21 S. E. 235.

In the case of *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252, 26 L. ed. 765, the claim made was similar to the

contention made in this case. Justice Bradley said: "If the permission to pay a premium or premiums after maturity was a matter of indulgence on the part of the company, it cannot be justly construed as a permanent waiver of the clause of forfeiture, or implying an agreement to continue the same indulgence for time to come. As long as the insured continued in good health it is not surprising and should not be drawn to the company's prejudice, that it was willing to accept the premium after maturity, and waive the forfeiture which might have been insisted upon. This was for the mutual benefit of themselves and the insured at the time, and in each instance in which it happened, it had respect only to that particular instance without involving any waiver in reference to future payments. The insured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion or a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse."

Under the above authorities, before complainant can recover in this case, she must show: ⁵⁶⁶ (1) That the course of dealing between the insurer and the insured, in reference to the acceptance of overdue premiums, amounted to a custom or a habit. (2) That by reason of this course of dealing, the insured was justified in believing that the company would not insist upon a forfeiture for his failure to pay his subsequent premiums ad diem. (3) That the insured did actually believe that he could postpone the payment of his future premiums after maturity without the risk of a forfeiture. (4) That the insured acted upon this belief in this instance, and that by reason thereof, did not pay the premium due December 30, 1904, at its maturity.

But this rule does not in any event apply, unless the payment is made and accepted during the life of the insured, so that we consider this course of dealing as really unimportant.

A permission to pay a premium after date during the life and good health of the insured is not equivalent to a permission to pay after his death. It is well settled that a course of dealing between the parties under which the insurer accepted overdue premiums when the insured was in good health,

will not give his representative or himself the right to pay or tender his premiums after maturity, and he is in a bad state of health, or had died: 2 Bacon, sec. 431; Crossman v. Massachusetts B. Assn., 143 Mass. 435, 9 N. E. 753; Hartford etc. Ins. Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct. Rep. 671, 36 L. ed. 496; National M. B. Assn. v. Miller, 85 Ky. 88, 2 S. W. 900.

⁵⁶⁷ The reason of this is, there has been an increase in the risk or hazard. An insurer might be willing to accept an overdue premium and reinstate an insured when his condition of health is the same as when the policy was originally issued, but it cannot be argued from this that he should be required to reinsure or reinstate the same person when he was or is in extremis. The course of dealing, if any, was to accept the overdue premiums from a live man, not a dead one.

At the time the tender was made in this case Thompson was dead.

As bearing somewhat upon this feature of the case, it had been held that illness of the insured is no excuse for his not paying his premium when due. The law and his contract require him to make provision for meeting his premiums when due, and if he fails to do this, he cannot be heard to complain by saying that he was physically unable to attend to his business: Thompson v. Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765; Klein v. New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662; Carpenter v. Centennial Mut. Life Assn., 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456.

In the case of Want v. Blunt, 12 East, 183, the contract provided that upon payment of premiums on a certain day, or within fifteen days thereafter, that upon the death of the insured the company would pay to his widow the amount named in the policy. The insured died in default of the payment of his premium, but it was tendered the company within fifteen days ⁵⁶⁸ after his death. The court held that the payment was not made in time; that the condition in the policy permitting the insured to pay within fifteen days after the due date of the premium meant, should pay "within fifteen days after due date, during the life of the insured."

Said the court: "This contract of insurance must be construed according to the meaning of the parties expressed in the deed. . . . The risk insured against is W.'s death. The duration of the insurance is so long as he continues to make

his payments, but the insurance is not to be void if paid within fifteen days after due. The question to be determined is whether at the death of the insured the policy had expired. The insurance is for a quarter of a year, and so on, from quarter to quarter, contingent upon the payment of premiums in advance. The death of the insured happened after one of the quarters had ended and when a new one had begun, but no payment of premium had been made as a consideration for the insurance for the new quarter. As the protection offered was only up to the beginning of a new quarter, its continuance thereof being dependent upon the payment of another quarter's premium, there was no insurance upon his life at the time of his death, hence the death happened during a period not covered by the policy. The payment of a premium for another quarter was equivalent to making a new assurance, though under a former policy. The frame ⁵⁶⁹ of this policy shows that the premium must be paid during the life of the assured."

This case was followed by *Pritchard v. Merchants' Ins. Soc.*, 3 Com. B. 622. Said Justice Willes: "The provision for revival upon the good health of the insured assumes that the subject upon which the insurance is to attach is a living person; otherwise the stipulation would be absurd. The very foundation of a life policy is that it is a contract for the payment of a certain sum upon the future death of a person then in being, in consideration of the present payment of the premium. The renewals or revivals of the contract, like the original, are clearly only for future assurance on a living person."

In the policy in the present case, it is provided that the insurance shall not be binding unless delivered during the lifetime of the insured; the provision in the certificate of health and revival contract that the insured should be in good health also contemplated his being alive at the time.

In *Carlson v. Supreme Council*, 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643, the by-laws of the benefit association provided that if the insured died in default of assessments or dues, his beneficiaries would have no rights under the contract. There was a further provision in the by-laws that if unpaid dues and assessments were paid within sixty days, the assured would be reinstated. After default, but before the expiration of the sixty days thereafter, the insured died, and his beneficiaries ⁵⁷⁰ tendered the amount of his unpaid as-

assessments and dues. The tender was refused and suit brought upon the beneficiary's certificate. The court held that before the policy was revived, and while the assured was in default, there was no insurance, and that the insured took the risk of losing his insurance if he died without having paid his premiums; that the meaning of the contract giving the assured sixty days after the date of his assessment to pay was that he must pay within that time and during his life. Said the court: "The contract of insurance becomes complete at the death of the insured. The liability or nonliability becomes fixed by that event. The right to recover depends upon the conditions existing at the moment of the insured's death."

To the same effect is *Miller v. Union Cent. Ins. Co.*, 110 Ill. 102.

"Payment after death creates no contract. There is no consideration for the insurance": *Bliss on Insurance*, sec. 316.

"There can be no valid insurance of the life of a dead man": *Bliss on Insurance*, sec. 355.

Complainant claims that the condition of the policy requiring payment of premium *ad diem*, or on failure the policy to become forfeited, was a condition subsequent, and no forfeiture could be claimed without some affirmative act on the part of the insurer. It is immaterial whether the condition of precedent or subsequent failure to pay when due in itself worked a forfeiture. ⁵⁷¹ The parties have so agreed, and the courts will enforce the agreement: *Ressler v. Fidelity M. L. Ins. Co.*, 110 Tenn. 411, 75 S. W. 735; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. Rep. 126, 47 L. ed. 204.

So, where the annual premium is payable in installments, a failure to pay any installment works a forfeiture: *Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. ed. 662.

Time is of the essence of the contract, and even though the condition be construed as a condition subsequent, failure to pay when due forfeits the contract: *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

The policy provides that after three years, if the payments required shall have been made when due, the policy shall be incontestable. This only means that it shall be incontestable for causes other than the nonpayment of premiums, but does not in any wise relieve the insured from the payment of his premiums, but, on the contrary, expressly stipulates that they shall be kept up and paid when due, during the twenty years' life of the policy.

An amended bill was filed under which it was, in substance, contended that under the terms of the policy when properly construed, no forfeiture would accompany nonpayment of any premium at maturity.

The contract of insurance provides that if the premiums payable on the 30th of March, June, September, and December of every year, are paid when due, the insurer will pay to the representative of the insured the ⁵⁷² face value of the policy "less the balance of the dues for the current year of the death of the insured, and any indebtedness of the member to said association, subject, however, to all the requirements hereinafter stated," etc.

This provision is followed by a provision for forfeiture upon the failure of the insured to pay, when due, any moneys required to be paid under the policy.

The contention is based upon a construction of the terms of the policy; and it is insisted that under them the company had absolute right to collect all of the payments due on the policy within any current year from its anniversary, notwithstanding the assured might die during the year and before some of the installments fell due, and having this right it was bound to give to the insured a corresponding right to insurance for the whole of the current year.

This amended bill was demurred to and the demurrer sustained; and this is assigned as error.

We think this contention cannot be maintained, as made by complainant in her amended bill.

The contract rightfully construed is that upon the death of the insured, while the policy is in an existing contract, i. e., when the premiums are regularly paid when due, the insurer shall have the right to deduct any accruing payment for the current year not then due. In other words, the right to deduct from the face of the policy the installments not due attaches only where the insured regularly meets his payments at maturity, ⁵⁷³ and dies before all of the payments for the current year become due.

In case of a default of any moneys due under the contract, it ipso facto becomes null and void.

But it is said that the contract of insurance is a contract for annual insurance, and that right of the insured and insurer must be determined from the status of the parties at an anniversary of the policy.

Concede that it is an annual insurance, still, it is an annual insurance with the payments to be made quarterly. It is expressly provided that a failure to make any payment when due will work a forfeiture; hence the annual insurance is subject to the voluntary default of the insured.

The privilege of paying the annual premium in quarterly installments was evidently for the convenience of the insured. Ordinarily, these premiums are payable as a whole in advance for the term of one year. The failure to pay the whole of the premium in such a case works a forfeiture in the event that it is so provided. In this instance the result is the same, upon the failure of the insured to meet his quarterly payments when due. At the end of any quarter there is no obligation imposed upon the insured to pay the next succeeding quarter; his failure to pay works a forfeiture of his contract, but the company cannot compel him to pay the remaining installments. In the event of the death of the insured, before the end of the first quarter, or any succeeding quarter, if he has paid his premiums when due, ⁵⁷⁴ his representatives are entitled to collect his insurance. In the absence of any provision permitting the company to deduct from the face value the remaining installments for the year, the insured would receive the face value of the policy, having paid one-fourth, two-fourths, etc., as the case may be, of the annual premium. In order to avoid this, the company said to the insured, "You pay your premium in installments; if you meet those installments regularly when due and die before all of the installments have become due, we will pay the face value of the policy," "less any unpaid portion of the yearly payments." In other words, the company reserves the right to deduct the dues for the current year accruing but not due. Thus, in the event of a loss, while the contract is in force, to preserve to itself the right to collect the unpaid portion of the annual premium. In the case of a default in the payment of any installment when due, the policy is no longer an existing contract, and the insurer has no right to collect the remaining installments.

As was said by the court in the case of *McConnell v. Provident S. L. Assur. Soc.*, 92 Fed. 769, 34 C. C. A. 663, where the court was called upon to construe a provision similar to the one in question: "It is an annual policy on which the premium is payable by quarterly installments,

leaving the insured at liberty to drop it at any quarter, and imposing no liability on the part of the company, unless the quarterly payment is made, when due. If, however, the insured died at the end of the first quarter ⁵⁷⁶ of the current year, the insurance company receives only one-quarter of the annual premium instead of the whole. It has insured the deceased for a year, subject to his voluntary default. He has died and the policy is earned. He should pay the whole year's premium therefor, but has only paid one-quarter's premium. To meet this injustice, the proviso was introduced that if the insured should happen to die before the whole of said quarterly payments should have become due, then the company will be entitled to deduct the premiums for all subsequent quarters of that current year from the amount of the policy. That proviso is not meant to apply to the case of a defaulted payment, but only to a case where the payments are regularly made as they become due, and where all the installments have not become due on the death of the insured. In this case, there was a failure to pay a quarterly installment on the day fixed. As a consequence the policy became forfeited."

The above case was based upon the authority of *Insurance Co. v. Sheridan*, 8 H. L. Cas. 745. In that case, the policy contained a provision that the annual premium for the whole term was thirty-three pounds sterling, payable by quarterly installments. If the insured should die, having paid his premiums when due, the policy would be payable for the sum insured. "But if the insured died before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premium for that year."

⁵⁷⁶ The insured died after the third installment became due, but before it was paid.

The house of lords, through Lord Campbell, held the contract to be an insurance from quarter to quarter, but that the payment of the quarterly installments was a condition precedent to the right to continue the policy as an existing contract. Lord Cramworth, while agreeing with Lord Campbell as to the result reached, was of the opinion that the insurance was an annual insurance with the payments due quarterly, and the failure to pay any installment when due worked a forfeiture of the contract. Said Cramworth: "The proviso (referring to the clause giving the insurer the right to

deduct unpaid portions of premiums) is not meant to apply to the cause of a default in payment when due, but to a case where the regular payments had been made as they became due, but where all had not become due."

The case of *Howard v. Continental Life Ins. Co.*, 48 Cal. 229, is also in point. There the policy provided for the payment of an annual premium in advance, or if the insured saw fit twice yearly or thrice yearly in advance. Further, that if the insured should die, to pay the face value after deducting any balance of the year's premium. There was a provision for forfeiture for failure to pay when due any moneys required to be paid under the policy. The insured elected to pay his premium thrice yearly, paying one-third upon the delivery of the policy. He died after the second installment became due and ⁵⁷⁷ remained unpaid. In a suit upon the policy, in which the claim was made that the provision giving the insurer the right "to deduct the balance of the dues for the current year" extended to the insured credit for the payment of his other installments until the last installment fell due, the court held: "First, the payment of the installment did not extend to the insured credit for the other installments until the end of the year, but that they should have been paid when due." Further, "less the balance for dues for the current year" did not have the effect of extending such credit, but that the meaning of those words was that the company could deduct any installment not due at the death of the insured, not only that the company was compelled to pay the face of the policy and deduct therefrom an overdue installment. The court said: "We agree that it was intended in case of the death of the insured before one or more installments became due that the company should deduct from the amount insured the balance of the current year's premium. But we do not think as a consequence of this right, reserved by the insurer, the insured was relieved of the necessity of paying any installment when it was agreed it should be paid. The company was authorized to deduct any installment not due at death; but was not compelled to pay the sum insured, with the right to deduct an installment overdue when death occurred."

Thus construing the several clauses, effect is given ⁵⁷⁸ to all stipulations of the contract; but to sustain the view of respondent, it would be necessary to ignore the portion of the

policy which fixes the thrice yearly payments, and making the policy read that the payments be made one-third at the beginning of the year. Primarily, the whole of the annual premium was payable in advance. The consideration for the policy was the payment of the whole premium; if not paid, the policy to lapse. But the option was given the insured to pay thrice yearly in advance. In the first case, there was no obligation to pay the sum insured unless the thrice yearly payments were made when due.

As said by the court in *Werner v. Metropolitan L. Ins. Co.*, 11 Daly (N. Y.), 176, complainant loses sight of the manner in which the payments are to be made, that is, upon the days named in the policy. Certainly the quarterly payments were due on the days named; the provision for forfeiture provides that any moneys, required to be paid under the policy, must be actually paid when due, otherwise the policy becomes void. Confessedly, there was a payment due on the policy December 30, 1904, but no payment made. The insured died fifteen days in default, and no tender until after his death. Under the plain terms of the policy it had ceased to be an existing contract.

The fallacy in the contention of counsel for complainant lies in his claim that the insured was entitled to one year's insurance from March, 1904 (anniversary of policy), absolutely. Whereas, the contract is that ⁵⁷⁹ he is entitled to such insurance only upon the condition that he pays his premiums when due.

Mr. Joyce says: "If the stipulation is that the annual premium shall be paid quarterly in advance upon specified days, or the policy shall be forfeited, the party will be held strictly to the performance of such a condition, and the contract becomes terminated by a nonpayment as stipulated. And this is so even though other portions of the contract refer to 'annual insurance' or 'yearly premium.' And though the policy provides that if all of the quarterly payments have not been made when the insured dies, the company may deduct the whole unpaid balance of that year's premium from the amount of the policy": Vol. 2, sec. 1108.

This is a hard case, but by no means an unusual one, where a party has failed to comply with the requirements of his policy, and death coming unexpectedly, he has lost all benefits under it by its plain provisions.

Complainant insisted upon a jury trial in the court below, but did not make demand for same according to the rule of the court. Moreover, there does not appear to be any disputed question of fact material to the decision of the case involved in it.

It is said that complainant is entitled to recover the penalty prescribed by acts of 1901, page 248, chapter 141.

Inasmuch as complainant, in our view of the case, is not entitled to recover the insurance, it follows, as a matter of course, she cannot recover any penalty for withholding it.

The decree of the court below is affirmed, with costs.

The Failure of an Insured to Pay the Premiums in accordance with the terms of the policy of insurance ordinarily works a forfeiture of his rights thereunder: *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862; *Pitts v. Hartford etc. Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96. However, if an insurance company, by its habits and course of business, creates in the mind of the policyholder a belief that payment of premiums may be delayed until demanded, or otherwise waives the right to demand a forfeiture, this is binding on the company, notwithstanding the policy expressly stipulates that it shall be void on nonpayment of premiums when due: *Home P. Co. v. Avery*, 85 Ala. 348, 7 Am. St. Rep. 54. An insurance company, having received assessments after they were overdue, and when the policy might have been forfeited for nonpayment, can insist upon a forfeiture only after having given the insured personal notice that thereafter punctual payment will be required: *Stylow v. Wisconsin Odd Fellows' M. L. Ins. Co.*, 69 Wis. 224, 2 Am. St. Rep. 738.

STATE v. BRADLEY.

[116 Tenn. 711, 94 S. W. 665.]

CRIMINAL LAW—*Forgery by Typewriting.*—Forgery may be committed by the use of a typewriting machine by which both the body of the instrument and the purported signature are written. (p. 837.)

Attorney General Cates, for the state.

Steele & Steele, for Bradley.

711 BEARD, C. J. The indictment in this case was rested on a very inartificial paper, the body and signature of which were typewritten and in the following words, to wit: "April 13, 1905. Mr. Robert Woods, please let John Bradley have

that suit and I will see that it is paid for the 17th of this month. \$8.00. [Signed] Mr. A. D. House, Agent. own hand print."

⁷¹² The indictment alleged that the defendant in error "unlawfully, fraudulently and feloniously did, by and with a typewriter, make, forge, and utter" this order on Robert Woods for a suit of clothes in the name of A. D. House to the "prejudice of the rights of said House." Upon motion the indictment was quashed, and the state has brought the case here and complains of error in this action of the court below.

Mr. Wharton, in his work on Criminal Law (volume 1, section 605), says: "That aside from writing by pen and ink, forgery may be committed by printing, by pencil writing, by the use of another's seal, by pasting one name on a note over another name, by photographic process, and by engraving or preparing materials for engraving." This text of the author is abundantly supported by authority. We have no doubt of the soundness of the rule there announced.

It follows that the trial judge, in quashing the indictment, erred. His judgment is therefore reversed, and the case is remanded for trial.

On What Constitutes Forgery, see the note to *Arnold v. Cost*, 22 Am. Dec. 306. Forgery is the fraudulent making of some writing to the prejudice of another's right: *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 88 Am. St. Rep. 770. Or it consists in causing a writing to appear of some legal efficiency which in truth it does not possess: *State v. Leonard*, 171 Mo. 622, 94 Am. St. Rep. 798. The chief essentials of the crime are: 1. A writing in such form as to be apparently of some legal efficacy; 2. An evil intent; and 3. The false making of such writing: *State v. Gryder*, 44 La. Ann. 962, 32 Am. St. Rep. 358; *People v. Bendit*, 111 Cal. 274, 52 Am. St. Rep. 186.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

FRENCH v. VRADENBURG.

[105 Va. 16, 52 S. E. 695.]

WILLS—Rights of Devisee—Subsequent Encumbrance.—A devisee of real estate, encumbered by the testator subsequently to the execution of the will, has a right to have the encumbrance discharged out of the personal estate of the testator, where the will directs the payment of all of his debts from any ready money or other personal property that he may have at the time of his death. (p. 839.)

EXECUTORS AND ADMINISTRATORS—Order of Payment of Debts.—The different funds or subjects of property constituting the estate of a deceased testator must be applied to the payment of debts in the following order: 1. The personal estate at large, not exempted by the terms of the will or necessary implication; 2. Real estate or an interest therein expressly set apart by the will for the payment of debts; 3. Real estate descended to the heir; 4. Real or personal property expressly charged with the payment of debts, and subject to such charge, specifically devised or bequeathed; 5. General pecuniary legacies; 6. Specific legacies; 7. Real estate devised by the will. (pp. 839, 840.)

W. W. Old & Son, for the appellant.

C. B. Garnett and J. B. Sears, for the appellees.

17 WHITTLE, J. The essential question presented by this record for decision involves the right of a devisee of real estate, encumbered by the testator subsequently to the execution of his will, to disappoint legatees, pecuniary and specific, by having the encumbrance discharged out of the personal estate, where the will directs the payment of all the debts of the testator and funeral expenses from any ready money or other personal property that he may have at the time of his death.

From an adverse decree, in a suit by the executors to construe the will and administer the estate, the devisee appealed.

The doctrine touching the order of liability of the assets of a testator's estate for the payment of debts has, in its various aspects, proved a fruitful source of discussion; and in the argument of the present case our attention has been drawn to numerous decisions of the courts, both in England and the United States, bearing upon the question. But whatever may be the weight of authority elsewhere, we are of opinion that the case comes within the influence and control of a line of precedents in this state so well established and universally followed in determining the order of liability of the assets of the estate of a testator as to have attained the dignity of canons of construction and the sanctity of rules of property.

Since the opinion of Judge Lee, in *Elliott v. Carter*, 9 Gratt. 541, which was delivered more than half a century ago, wills ¹⁸ have been written and estates administered on the faith of that decision throughout the commonwealth; and if it, and the decisions of this court which have followed it, are to be overruled, it should be done by act of the legislature, and not by the courts. That course was pursued in England by Lock King's Act, 17 & 18 Victoria, chapter 113, amended by 30 & 31 Victoria, chapter 69, page 706, which in effect declares that when a testator shall die seised of mortgaged property, and shall not by his will or deed have signified a contrary or other intention, lands devised subject to a mortgage or other equitable charge, including a vendor's lien, are primarily chargeable therewith, and such devisee is not entitled to have the mortgage debt discharged or satisfied out of the personal estate.

In *Elliott v. Carter*, 9 Gratt. 541, it was held that, in the absence of an express charge, the personal estate constitutes the natural primary fund for the payment of debts. But where, as in that case, both personal property and real property were equally and expressly charged, they stand on the same footing, and each contributes ratably to the discharge of the common burden. The learned judge, in the course of his opinion, formulates the following rule, determining the order in which the different funds or subjects of property constituting the estate of a deceased testator shall be applied to the payment of debts: 1. The personal estate at large, not exempted by the terms of the will or necessary implication; 2.

Real estate, or an interest therein, expressly set apart by the will for the payment of the debts; 3. Real estate descended to the heir; 4. Real or personal property expressly charged with payment of debts, and then, subject to such charge, specifically devised or bequeathed; 5. General pecuniary legacies; ¹⁹ 6. Specific legacies; and 7. Real estate devised by the will.

The main case has been since followed and cited in numerous decisions of this court: *Crouch v. Davis' Exr.*, 23 Gratt. 62; *Murphy's Admr. v. Carter*, 23 Gratt. 477; *Cockerville v. Dale*, 33 Gratt. 45, 49; *Edmunds' Admr. v. Scott*, 78 Va. 720; *Allen v. Patton*, 83 Va. 255, 2 S. E. 143; *New's Exr. v. Bass*, 92 Va. 383, 23 S. E. 747; *Todd v. McFall*, 96 Va. 754, 32 S. E. 472; *Frasier v. Littleton's Exr.*, 100 Va. 9, 40 S. E. 180.

The precise question decided in *Todd v. McFall*, 96 Va. 754, 32 S. E. 472, was that a pecuniary legatee, whose legacy had been diminished by the discharge of a vendor's lien resting upon real estate at the time of the testator's death, was not entitled to be subrogated to the right of the vendor against such real estate in the possession of a specific devisee. Replying to the contention that, as the legacies were expressly made a charge on the personal property and it was consumed in the payment of debts, Mrs. McFall was entitled to be paid her legacy out of the real estate, and especially to the extent that the personal property was applied to the relief of the vendor's lien, the court said: "The answer to this position is that the will not having charged the real estate with the payment of the debts, nor made any other provision for their payment, the law makes the personal property the primary fund for their satisfaction; and if the testator was mistaken as to the value of his personal property, and it has proved inadequate to pay both debts and legacies the latter must abate to the extent of the disappointment, and cannot be reimbursed out of the land for the loss. A legatee has no right to call upon the devisee to contribute to the payment of the legacy unless the real estate be charged with its payment, not even when the personal property has been applied in exoneration of the land from a mortgage debt or vendor's lien, if the debt was contracted and ²⁰ the mortgage or lien on the land was created by the testator himself." *Elliott v. Carter*, 9 Gratt. 541, is relied on, among other authorities, to sustain the proposition.

In *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108, the court held that where there were several specific devises of real estate, not charged by the will with the payment of debts, one of which the testator in his lifetime, after the will was written, encumbered by mortgage, on a deficiency of personal assets to pay the mortgage, the devisee took the devise cum onere, and was not entitled to call upon other devisees to contribute to the payment of the mortgage. The decision rests upon the familiar and well-settled principle that securities will never be marshaled to the injury of persons over whom the party invoking the doctrine has no superior equity: *Lee v. Swepson*, 76 Va. 173; *Peery's Admr. v. Elliott*, 101 Va. 709, 44 S. E. 919; 3 *Minor's Institutes*, 612; 2 *Jarman on Wills*, 6th ed., Bigelow, 581.

The incidental remark of the judge who wrote the opinion in that case, that real estate encumbered by subsequent mortgage fell in the fourth class of Judge Lee's enumeration, was inexact and merely by the way. It in no wise affected the result, which, as we have seen, rested upon the principle that the equitable doctrine of marshaling does not obtain among devisees of real estate under the facts of that case, and was not intended as a departure from or modification of the rule in *Elliott v. Carter*, 9 Gratt. 541.

The reason for the rule established by Lock King's Act, and cognate authorities, which allows the legatee who has been disappointed of his legacy by the application of the personal property to disencumber real property specifically devised, to stand in the place of the encumbrancer, is to give effect to the will of the testator as a whole, which it is said can only be done by requiring the devisee to take cum onere. But it would seem ²¹ that under the facts of this case, to uphold the contention of the appellees would violate the principle which they invoke to sustain it; for in this instance, as we have seen, there is an express charge upon the personal estate for the payment of debts, subject to which charge the legacies were given.

It follows from these views that the decree of the circuit court, in so far as it exonerates the personal property from the payment of the liabilities set forth in the seventh paragraph of the decree, and charges that indebtedness primarily upon the real estate therein described, and directs the payment of pecuniary legacies and the delivery of specific lega-

cies bequeathed by the will to the respective legatees, is erroneous, and must to that extent be reversed and annulled, and the cause remanded for further proceedings to be had therein not in conflict with this opinion.

A Devise of Land Subject to a Mortgage made by the testator imports an intention that the debt be satisfied out of the general personal assets: *Bulkley v. Seymour*, 74 Conn. 459, 92 Am. St. Rep. 229; *Hunt, Petitioner*, 19 R. I. 139, 61 Am. St. Rep. 743. If a specific devise is made of real property which is subject to a mortgage, the devisee, in the absence of an expression of a contrary intent on the part of the testator, is entitled to have such property exonerated from the mortgage, even though the personal estate is insufficient to pay the general legacies: *Brown v. Baron*, 162 Mass. 56, 44 Am. St. Rep. 331.

TOWNSEND v. NORFOLK RAILWAY AND LIGHT COMPANY.

[105 Va. 22, 52 S. E. 970.]

STREET RAILWAYS—Public Service Corporations—Duties.—

An electric street railway company is a public service corporation, and as such it has duties both of a public and private nature. It must perform its public duties, but in the performance of its duties not of a public nature which are incidental to those of a public character, it stands upon the footing of a private corporation, and with respect to the duties of the first class, in doing that which under the law it is required to do, it cannot be considered as doing an unlawful act, and if a lawful act is done without negligence, any injury which it occasions is *damnum absque injuria*. (p. 847.)

STREET RAILWAYS—Site for Power-house.—While an electric street railway cannot be operated without a power-house, yet the selection of a site therefor, and the generation of power, are mere incidents to the operation of the road and mere private business with which the public has no concern, and in such business the company stands on the same footing as a mere individual, with no special privileges. (pp. 850, 851.)

STREET RAILWAYS—Location of Power-house—Nuisance.—A grant of power to an electric street-car company to construct and operate its road in a city gives no authority to locate its power-house where it will be a nuisance, nor to so locate it as, by its use, to unreasonably interfere with and disturb the peaceable and comfortable enjoyment of others in their property; and if injury is inflicted upon others by such location and operation of a power-house, the company must respond in damages. (p. 852.)

NUISANCE—Legislative Authority.—To escape liability for a nuisance created incidentally to an act, the performance of which is authorized by statute, it must appear that the particular act complained of, and immunity from its consequences, were within the

contemplation of the legislature at the time of enacting the statute. (pp. 856, 857.)

NUISANCE—Legislative Authority.—While the legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly granted, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury. (pp. 860, 861.)

T. Taylor and T. A. Williams, for the plaintiffs in error.

W. H. Venable and White, Tunstall & Thom, for the defendant in error.

24 KEITH, P. The plaintiffs in error brought an action of trespass against the Norfolk Railway and Light Company, and their declaration states: That they were seised and possessed, as joint owners, of a certain lot of land, with the buildings and improvements thereon, situated on the west side of Cumberland street, in the city of Norfolk, Virginia; that the Norfolk Railway and Light Company, a corporation organized under the laws of the state of Virginia, owned a certain lot in the city of Norfolk, fronting on Cove street; that the defendant had erected on this lot a power-house, equipped with large and heavy machinery, consisting of boilers, engines, dynamos, condensers and generators, for the purpose of generating electric power, and as a part of its equipment of said power-house had erected in connection with its buildings three or more metal stacks; that it was the duty of the defendant so to maintain and operate its power-house and plant as not to injure or interfere with the comfort, use and enjoyment by the plaintiffs of their property; but disregarding its duty in this behalf, on the first day of August, 1902, and on divers other days prior thereto and continuously up to the present time, the defendant did so wrongfully and unjustly operate and conduct its plant, or power-house, that large columns of smoke, dust, cinders, sparks and soot had been emitted from the stacks of the defendant, and thrown, propelled, and hurled against, upon and through the houses of the plaintiffs on the property aforesaid, thereby preventing its proper and useful enjoyment by the plaintiffs; that their property had been made untenable, and that its rental and salable value had been depreciated; that the houses of the plaintiffs upon their property, as aforesaid, had been and were being greatly shaken and damaged, in such a manner as

to cause the same to become and be uncomfortable, dangerous, and uninhabitable; that by reason of the premises the property of the plaintiffs had deteriorated in value, both ²⁵ as income-producing and as marketable property; and, further, that the defendant, by allowing the electric current from the wires and conduits, or on return circuit, to escape from its wires, or returning by ground circuit, to run over and through the pipes of metal placed to carry water and gas to the house of plaintiffs, has caused the metal pipes, thus acting as conductors of electricity, to be eaten up and destroyed; and that although the defendant has been often requested by the plaintiffs to refrain and desist from the wrongful and unjust operation and management of its said plant, or power-house, in the several ways hereinbefore described, yet it has refused to desist from the said wrongful and unjust operation and management of its plant, as aforesaid, to the damage of the plaintiffs two thousand dollars.

To this declaration the defendant filed a special plea, in which it sets out that, before the time of the committing of the alleged grievances in the declaration mentioned, the General Assembly of Virginia had passed an act to incorporate the Virginia Electric Company, by which it was provided that it should have power to construct, lease, purchase or acquire by consolidation with any other company or companies, and operate and maintain in the city of Norfolk, suitable works, machinery, or plants, for the manufacture of electricity, and for the sale and distribution of the same; that it should have power to sell and distribute the same for public or private illumination, for heating and for power, and for any other purposes which the same might be used for; that it should have power to do such acts and things, and conduct such enterprises as might be convenient in connection with or incidental to the enjoyment of the powers thereinbefore conferred; and that it might, with the consent of the proper authorities of the city of Norfolk, use the streets and roads thereof for laying its mains, pipes, wires, and erecting its poles; that by an act of the legislature, entitled "An act to incorporate ²⁶ the Old Dominion Electrical Development and Power Company," it was provided that the said Old Dominion Electrical Development and Power Company should have power to erect, maintain and operate plants in this state for the generation of electricity and the supply of electric

current for its own use and for sale to persons, natural or artificial, desiring to use the same for heat, light or power, or any and all uses to which the electric current might then or at any time thereafter be applicable, and might manufacture, use and sell, distribute and furnish the same for said purposes, and all electrical supplies of all kinds, to all and any persons and corporations, upon such terms as might be agreed upon by and between the contracting parties; that by the seventh section of the act last above mentioned it was provided that the board of directors of the Old Dominion Electrical Development and Power Company should have the power to change the name of that company and to adopt such other name as they might deem proper upon the fulfillment of certain specified conditions; that in pursuance of said power the board of directors changed the name of the Old Dominion Electrical Development and Power Company, so that it became and was the Norfolk and Ocean View Railway Company; that said last-mentioned company, by virtue of the powers granted to it by its acts of incorporation, acquired the works, property, rights, privileges and franchises of the Virginia Electric Company; and that said Norfolk and Ocean View Railway Company thereby became and was entitled, empowered and authorized to do and perform any, all and singular, the acts referred to in the act of incorporation of the Virginia Electric Company, as well as any, all and singular the acts requisite, necessary or proper in connection with the powers, privileges and rights of the said company in the matter of carrying on the business of the said company. The plea further avers that on the second day ²⁷ of November, 1899, by an agreement entitled "Agreement of consolidation of the Norfolk Street Railroad Company and the Norfolk and Ocean View Railway Company under the name of the Norfolk Railway and Light Company," the said Norfolk Railway and Light Company became and was possessed, and still is possessed, of any, and all and singular, the rights, franchises, privileges, powers, works, properties, and all other interests of any sort whatever of the said constituent companies, the Norfolk Street Railroad Company and the Norfolk and Ocean View Railway Company, and especially and particularly the particular powers, privileges and rights hereinbefore more fully specified as to the operation and maintenance of the plants of the said companies; that under the said con-

solidation agreement the defendant became and was possessed, and still is possessed, of the said plant, power-house and manufactory, which is the same plant, power-house and manufactory as are complained of in the declaration of the plaintiffs; that not only has it obtained legislative sanction and authority for the operation of the said plant, power-house and manufactory, machinery and boilers, but that furthermore, at divers times, the defendant has obtained permission and authority from the councils of the city of Norfolk to install the said machinery and boilers in its power-house and manufactory; and further avers that, pursuant to the legislative and municipal authority had and obtained, as aforesaid, it has ever since operated, and still continues to operate, its said plant in a proper, careful, reasonable, and suitable manner; that it is necessary to the proper carrying on of defendant's business to operate and maintain the said power-house, manufactory and plant in the manner in which it has been, and is being, operated; and that it has done no damage and occasioned no discomfort that is not the natural, proximate, inevitable and necessary result of such proper, careful, reasonable ²⁸ and suitable operation, without this, that the said defendant is guilty of the said supposed grievances, or any of them, in manner and form as the said plaintiffs hath above thereof complained, and of this it puts itself upon the country.

The plaintiffs demurred to this special plea, and that demurrer was overruled by the court. And the plaintiffs not withdrawing, nor desiring to withdraw, their demurrer, the court gave judgment in favor of the defendant.

Section 153 of the constitution declares that the term "public service corporation" shall include "all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley or public highway, whether along, over, or under the same, in a manner not permitted to the general public."

Under the terms of this definition it is apparent the Norfolk Railway and Light Company is to be deemed a public service corporation.

It will be observed that the declaration nowhere states that the injury of which the plaintiffs complain was caused by any negligent act upon the part of the defendant. The contention of plaintiffs is that in the operation of its plant the

defendant wrongfully caused smoke, dust, cinders, sparks and soot from its chimney-stacks to be thrown and propelled upon and through the houses of the plaintiffs; that by the operation of its heavy machinery it caused the houses of the plaintiffs to be greatly shaken and damaged; and that by permitting the electric current from its wires and conduits, or on return circuit to escape from its wires, or returning by ground circuit, to run over and through the pipes placed to carry water and gas to the houses of plaintiffs, the pipes had been eaten up and destroyed; and ²⁰ the useful and proper enjoyment of the property been impaired; it had been rendered untenable and its value diminished.

The defendant replies that it has operated, and continues to operate, its plant in a proper, careful, reasonable and suitable manner, in pursuance of legislative and municipal authority conferred upon it.

The question, therefore, for us to consider, is, whether or not the court erred in overruling the demurrer to this plea.

The declaration sets forth a nuisance; the defendant justifies what it has done by pleading legislative authority for its acts.

A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform; it has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*.

This aspect of the case was before this court in *Fisher v. Seaboard Air Line Ry. Co.*, 102 Va. 363, 46 S. E. 381, where it was said that a railroad company acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent land owner for damages resulting from noises, jarring and shaking of buildings, dust and smoke incident to the running of trains; for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way. To the authorities relied on in support of this case many others may be added.

³⁰ *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 234, 13 Atl. 164, from the supreme court of New Jersey, is strikingly in point. That was a suit for damages done to the houses and lands of plaintiff by the running of defendant's trains, to which the defendant replied that it acted under franchises derived from the public grant, and that it had built its road and run its trains, carrying merchandise and freight, near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily resulted from the transaction of such acts and business; and that for such incidental and unavoidable damage it was not responsible. The plaintiff contended that with respect to private property a railroad is per se a nuisance whenever it throws a detriment, such as would be actionable at common law, on such property. Upon this the court said: "That this proposition, on which the plaintiff's case rests, is a most momentous one is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damnified by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all; unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim *de minimis non curat lex*. The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make ³¹ these companies, touching such land owners, general tort-feasors. Their tracks run for miles through the cities of the state, and every land owner on each side of the track would be entitled to his action; and so, in the less populated districts, each proprietor of lands adjacent to the road would have a similar right; and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility. Nor is this susceptibil-

ity to be sued on all sides the only, or even the worst, consequence of the theory in question; for, if these rights of action exist, it follows, necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor court refuse to enjoin a continuance of the nuisance. Nor does there appear to be any relief from such a consequence; the aggrieved land owner would be the master of the situation; for there is no law by force of which the company could take his land in invitum, or compel him to have his damages assessed once for all. In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question." In concluding his opinion, the learned judge says: "I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office."

That railroad corporations—public service corporations—are in many aspects to be regarded as quasi public corporations, can no longer be doubted. Upon that theory their duties are measured and their rights determined; and the control which the ³² state asserts, the exercise of which is becoming more and more necessary with the growth and development of our transportation system, of which railroads constitute so essential a part, rests upon the public character of such corporations. A railroad, in the operation of its trains in the transportation of freight and passengers, is in the exercise of a public duty, and should be permitted to apply the same principles of construction when it pleads, for its protection, the powers conferred upon it by the legislature, as are urged when the obligations imposed by the same charter are insisted upon in the effort to compel such corporations faithfully to perform the duties which they have assumed with respect to the public.

It would be easy to multiply authorities along this line. Indeed, *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, upon which plaintiffs in error justly rely in another aspect of this case, uses

the following language: "Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

We shall not press this view of the case further, for counsel for plaintiffs in error state in their brief that they do not "seriously contest" the doctrine enunciated by this court in *Fisher v. Seaboard Air Line Ry. Co.*, 102 Va. 363, 46 S. E. 381.

³³ But was the defendant in error acting in its public capacity when it committed the grievances complained of? Every allegation in the declaration is directed against the injuries inflicted by the operation of the power-house of the defendant. It is true that an electric railway cannot be operated without a power-house; it is true that an engine-house is a necessary adjunct to a steam railway; but they are incidents to the operation of the road, with which the public has no concern.

Pollock on Torts, at page 158 of the second edition of his work, says: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house."

In *Re Rhode Island R. Co.*, 23 R. I. 457, 48 Atl. 591, 52 L. R. A. 879, it is said: "The common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public; the private part is its incidental business, with which the public is not concerned and which the company manages for its own interest. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the fran-

chise is for the benefit of the public, but that which pertains simply to means of supply is a private business of the company."

To the same effect is *Louisville etc. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188, where it is said: "But over and beyond this, we think a corporation in selecting a place for its roundhouse acted in a private capacity,³⁴ and is responsible for the injurious consequences which may result from its use."

In *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164, the court said: "A railroad company in selecting a place for repair-shops and engine-house acted altogether in its private capacity. Such location was a matter of indifference to the public; and consequently with respect to such an act the corporation stood on the footing of an individual, and was entitled to no superior immunities."

In *Baltimore & Potomac R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, the Baptist Church claimed that its services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were at times so great as to prevent members of the congregation, sitting in parts of the church farthest from the shops, from hearing what was said; that the act of blowing off steam occupied from five to fifteen minutes, and frequently compelled the pastor of the church to suspend his remarks. The main reliance of the railroad company to defeat the action was the authority conferred upon it by the act of Congress of February 5, 1867, to exercise the same powers, rights and privileges in the construction of a road in the District of Columbia, the line of which was afterward designated, which it could exercise under its charter in the construction of a road in Maryland, with some exceptions, not material here. By its charter it was empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of the road. In its opinion the court says: "It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion³⁵ and maintenance

of its road, and that the engine-house and repair-shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine-house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. . . . Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

In *Ridge v. Pennsylvania R. R. Co.*, 58 N. J. Eq. 172, 43 Atl. 275, the Beseman case (50 N. J. L. 235, 13 Atl. 164), and *Baltimore C. P. R. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, are considered, and the court says: "In the latter case it was denied by the supreme court of the United States that the railroad had been invested with the privilege of building an engine-house or repair-shop next to a church in the city of Washington. The court held that the grant of power did not authorize the company to place such structure wherever it might think proper in the city without reference to the property or rights of others. The doctrine of that case was approved in the opinion of *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164, upon the ground that in selecting the place for repair-shops the railroad company acted altogether in a private capacity. Such location, it was said, was a matter of indifference to the public, and consequently, with ³⁶ respect to such act, the corporation stood upon the footing of an individual, and was entitled to no superior immunities. What was meant was that while the public was concerned that a railroad company should have all the appliances, including repair-shops, to make its public service effective, it was immaterial to the public where such appliances were placed, so long as the service was efficient. All that concerns the public

is to have an efficient service in the way of transportation of persons and freight. The company is shielded from responsibility for incidental damages resulting from acts which are necessary to bring about such service. In the federal decision it was admitted that the company, by virtue of its franchise, had the right to build repair-shops and engine-houses, but, having the liberty to choose different sites for its structures, it was bound to select one where they would not inflict an injury upon the property of others."

In *Rapier v. London Tramways Co.*, [1893] L. R. 2 Ch. D. 588, the syllabus of the opinion delivered by Lindley, L. J., is as follows: "The defendants were a tramway company, who were empowered by their act to lay down and construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and built some large blocks of stables near the plaintiff's house for the horses employed in drawing the cars. The plaintiff complained of the smell caused by the stables, and brought an action for an injunction to restrain the defendants from using the stables so as to cause a nuisance. Held (affirming the decision of Kekewich, J.), that although horses were necessary for the working of the tramways, the company was not justified by their statutory powers in using³⁷ the stables so as to be a nuisance to their neighbors, and that it was no sufficient defense to say that they had taken all reasonable care to prevent it."

Other aspects of this case were discussed before us, upon which we have not deemed it necessary to touch; and without intimating any opinion upon them, except in so far as has been herein expressed, we shall content ourselves for the present with saying that we are of opinion that the circuit court should have sustained the demurrer to the special plea.

UPON A PETITION TO REHEAR, FEBRUARY 23, 1906.

KEITH, P. In the opinion delivered by the court when the judgment sought to be reviewed by this petition for rehearing was pronounced, it is said:

"The declaration sets forth a nuisance; the defendant justifies what it has done by pleading legislative authority for its acts.

"A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform; it has other duties not of a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

This position is earnestly assailed in the petition for a rehearing, where it is broadly asserted that no such distinction ^{as} between the public and private functions of a corporation exists, and that all is lawful which the legislature authorizes to be done, although the authority conferred be not imperative, but merely permissive.

It may be that in the distribution of the duties of a public service corporation into those of a public and those of a private nature, the classification was inaccurate and unscientific, though it has the sanction of courts of the highest respectability. By other courts the same conclusion is reached by a consideration of the language used by the legislature in the act of incorporation, and by its construction determining whether or not the law-making power intended to permit an act to be done, or to require its performance; to confer a privilege, or to impose a duty.

In the case of *Fisher v. Seaboard Air Line Ry. Co.*, 102 Va. 363, 46 S. E. 381, the position of this court is well stated in the syllabus: "A railroad company, acting under authority of law, whose road is constructed and operated with judgment and caution, and without negligence, is not liable to an adjacent land owner for damage resulting from the noises, jarring and shaking of buildings, dust and smoke, incident to the running of trains. No action lies for the loss or inconvenience resulting from doing an authorized act in an unauthorized way." This is to be understood, of course, in the light of the facts presented in that record, where damages were claimed for the noises, jarring and shaking of buildings, dust and smoke incident to the running of trains. We were of opinion that in the absence of negligence, no damages could be recovered for the reason that the road was obliged to run its trains, which could not be done, whatever the degree of caution exercised, without the inconvenience and injuries enumerated.

³⁹ In *Makely v. Southern Ry. Co.*, complaint was made of the operation of trains of the defendant company, and of a power-house maintained by it for the purpose of lighting the various buildings in its yards. There was a bill praying an injunction filed in the circuit court of Alexandria, which the learned judge of that court refused, but without prejudice to the right of plaintiff to seek her remedy at law. There was no question made as to the solvency of the railway company, or its ability to respond in any damages which might be adjudged against it. We concurred with the judge of the circuit court in the opinion that, at least in the preliminary stages of the case, before the right had been established at law, it would be improper to enjoin the defendant company. And just here it may be proper to state that while upon a petition for a writ of error or appeal, this court is required to grant the writ prayed for unless the decision called in question be plainly right, we should not overrule the decision of the lower court and grant an injunction which it has refused, unless the error in refusing it be manifest.

We have mentioned the *Fisher* case (102 Va. 363, 46 S. E. 381), and the *Makely* case, not with any view to vindicating our consistency, but because we felt that it would be well to clear up any doubt that might exist as to the attitude of this court with respect to those decisions.

Coming back to the petition for rehearing, we find the position of the petitioner thus stated: "The application of this doctrine of 'private capacity' is wholly inconsistent with the principles enunciated in the *Fisher* case (102 Va. 363, 46 S. E. 381). We think that the fact that the doctrine is wholly erroneous can easily be demonstrated by stating it in the form of a syllogism, thus:

"The injuries done to property without negligence by a public service corporation, for which it will be held liable, are those done by it in its private capacity.

⁴⁰ "All injuries done to property without negligence by a public service corporation are done by it in its private capacity (i. e., by the means and methods employed).

"Therefore, a public service corporation is liable for all injuries to property done by it without negligence.

"The conclusion is manifestly incorrect, and at least one of the premises must therefore be erroneous. The second

premise we think we have demonstrated to be correctly stated—that is, that injuries to property are the result of the means and methods employed, and not of the public service performed. The error lies, therefore, in the first premise.

“The vice in this premise, and the simple answer to the various illustrations which we have given above, is demonstrated by a statement of the true principle, which is that a public service corporation, acting without negligence, is not liable for injuries which are the necessary consequences of the performance of its authorized functions. And we need go no further in search for authority for this position than the Fisher case (102 Va. 363, 46 S. E. 381), itself, where the court, quoting from Pollock on Torts, said: ‘It is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.’ ”

We must again advert to the principle that all opinions are to be considered in the light of the facts to which they apply, for the transition from an authorized to an unauthorized act—from that which is lawful to that which is unlawful—is oftentimes by easy and almost imperceptible gradations, so that in the enunciation of a principle the eye must always be kept upon the precise facts upon which it is to operate.

Almost all the questions upon which the law is doubtful or obscure arise at the vanishing point between contradictory and irreconcilable principles, and mark the effort “to deduce harmony ⁴¹ from the reciprocal struggle of discordant powers.”—Burke.

Law is not an exact science. It has no invariable standard by which rights may be measured. It does not submit to inflexible rules of logic, nor can it, in its application to the varied affairs of men, always clothe itself in the form of a syllogism; and while we might hesitate to go to the full length of the view expressed by the great moralist we have just quoted, it is to a large extent true that “every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.”

We should not, therefore, have been disposed to abandon our position, even though it had failed when subjected to the syllogistic test; but we are not prepared to admit that the test has been correctly applied. We do not admit the truth

of the minor premise—we do not admit that all injuries done to property without negligence, by public service corporations, are done by them in their private capacity.

All injuries done to property, without negligence, by a public service corporation for which it will be held liable, it may, perhaps, be conceded are done by it in its private capacity; but there are injuries done by it in its public capacity for which it will not be held liable, and in that distinction is to be found the very gist of this controversy.

Nor can we concur in the answer which the petitioner suggests to the illustrations which it had given. We cannot admit that a public service corporation, acting without negligence, is, under all circumstances, irresponsible for injuries which are the necessary consequence of the performance of its authorized functions. There must be something more than authority to do the act complained of. It must be an act which the corporation is required to perform—a duty it owes and which has been ⁴² imposed upon it by the legislative act granting the charter by which it exists—or at least it must appear that the particular act complained of and immunity from its consequences were within the contemplation of the legislature. It is true that in *Pollock on Torts*, quoted in the *Fisher* case (102 Va. 363, 46 S. E. 381), it is said that “no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner”; but *Pollock* also says, in his second edition, at page 158: “A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of his house.” The two statements by the same author are apparently opposed to each other, and yet may be in entire harmony as applied to varying conditions of facts. .

In *Managers of the Metropolitan Asylum Dist. v. Hill*, [1880-81] 6 App. Cas. 193, the metropolitan poor act, authorizing the formation of districts and district asylums for the care and cure of sick and infirm poor, created corporations for that purpose, and gave authority to the poor law board to issue directions to these corporations, enabled them

to purchase lands and erect buildings for the purposes of the act, and made the rates of parishes and unions liable for the outlay thus incurred. But it does not by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighborhood of the place where the land is purchased or the buildings erected, it does not afford to these acts a statutory protection. And, therefore, where such nuisance was found as a fact, it was held that the district board ⁴³ could not set up the statute, nor the orders of the poor law board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance; and in continuing his opinion Lord Blackburn states this principle: "On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication." And per Lord Watson it was said: "Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights."

That case finely illustrates the effect of a statute merely permissive in its terms.

In *London etc. Ry. Co. v. Truman*, L. R. 11 App. Cas. 45, a railway company was authorized, among other things, to carry cattle, and to purchase by agreement, in addition to the lands which they were empowered to purchase compulsorily, any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the com-

pany, some years after ⁴⁴ the expiration of the compulsory powers, bought land adjoining one of their stations and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business. Held, that the purpose for which the land was acquired being expressly authorized by the act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company, distinguishing between the case of *Metropolitan Asylum Dist. v. Hill*, just cited. Among those who delivered opinions in this case was Lord Blackburn, from whom we have just quoted, who says, in part: "I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighboring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature," again resting the case upon a proper construction of the act of incorporation. In this case the house of lords reversed the decisions of the court of appeal, and of North, J., which is to be found in 25 Ch. D. 426. It undertakes to distinguish, while it does not overrule, *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193, and seems to rest upon the express terms of the act of parliament under consideration. It is at most merely persuasive authority, and if it decides that a merely permissive authority from the legislature confers complete immunity ⁴⁵ from acts which constitute a nuisance, if not negligently performed, it would be irreconcilable with other English cases of high authority—indeed of equal authority with itself—with the decisions of the supreme court of the United States, and with those of state courts, to which we shall presently advert.

In *Cogswell v. New York R. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, the syllabus is as follows: "Whether

the legislature can authorize a railroad corporation to maintain an engine-house, under circumstances which, if maintained by an individual, would, by the common law, constitute a nuisance to private property without providing compensation, *quaere*;

"But if this should be conceded, nevertheless the statutory sanction which will justify an injury by a railroad corporation to private property without making compensation therefor, and without the consent of the owner, must be express or given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury; it may not be presumed from a general grant of authority.

"Where the terms of a statute giving authority to such a corporation are not imperative, but permissive, this does not confer license to commit a nuisance, although what is contemplated by the statute cannot be done without."

In *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711, it is said that "although the acts complained of are inseparably connected with the carrying on of the business itself, and the resulting damages a necessary consequence, if those acts constitute a nuisance *per se*, it is not necessary to show negligence in order to sustain a recovery.

48 "Every person is bound to make a reasonable use of his property, having respect for his neighbor's right; a use which produces destructive vapors and noxious smells, resulting in material injury to the property and the comfort of those dwelling in the neighborhood, is not reasonable, and is a nuisance *per se*.

"As a general rule, corporations authorized by statute to carry on a business, although it may be of a quasi public character, are under the same obligations to make a reasonable use of their property and to respect the rights of others as are citizens.

"While the legislature may authorize acts, which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred,

and it must appear that the legislature contemplated the doing of the very act which occasioned the injury."

This whole subject is considered by the supreme court of the United States in *Baltimore etc. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, which was decided in 1883, and has met with general approval. The Baltimore and Potomac Railroad Company was authorized by act of Congress to lay its track within the limits of the city of Washington, and to construct other works necessary and expedient to the proper completion and maintenance of its road. It erected an engine-house and machine-shop on a parcel of land immediately adjoining the church, and used them in such a way as to disturb, on Sundays and other days, the congregation assembled in the church, to interfere with religious exercises therein, break up its Sunday schools, and destroy the value of the building as a place of public worship. Suit was brought against the railroad company to recover damages, and among ⁴⁷ other defenses the company relied upon statutory authority; and its counsel undertook to maintain that "no action will lie and no recovery can be had for doing that which the law authorizes the party to do, and that cannot be adjudged a nuisance and be held unlawful which the law declares to be lawful." Answering that contention, Mr. Justice Field says: "The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does not assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of

the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

"Undoubtedly, a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their ⁴⁸ use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

It is said in the petition that the latter part of this quotation is a dictum. We hardly think so; but even if it were, it is the dictum of a judge whose great ability entitles his every utterance to the highest respect, and is sanctioned by the concurrence of the entire court. We may safely consider that opinion as expressing the fixed views of the supreme court of the United States upon the questions discussed.

The legislative authority relied upon in this case (Acts 1897-98, pp. 495, 1020, respectively) is as follows:

At section 2, page 496, occurs the following language: "The said company shall have power to construct, lease, purchase or acquire by consolidation with any other company or companies, and operate and maintain in the city or county of Norfolk, or both, and in any other city, town or village in the said county, suitable works, machinery and plants for the manufacture of electricity, and for the sale and distribution of the same; and it shall have power to sell and distribute the same for public and private illumination, for heating, for power and for any other purposes which the same may be used for, and it shall have power to do such acts and things, and conduct such enterprises as are convenient in connection with or incidental to the enjoyment of the powers hereinabove conferred, and may, with the consent of the proper authorities of the city of Norfolk, and of such other city, or town, or county as are named above, use

the streets and roads thereof for laying its mains, pipes and wires and erecting its poles."

And at section 3, page 1020, it is declared that "The said company is authorized to promote, establish and maintain the business ⁴⁹ of a general railway and electrical company. To erect, maintain and operate plants in this state for the generation of electricity and the supply of electric current for its own use and for sale to persons, natural or artificial," etc.

In these quotations is found the sole authority of the defendant, to permit or to require, to excuse or to justify it in the performance of the acts complained of in this suit. The case is, therefore, plainly to be classed with *Baltimore etc. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, and other cases which we have cited, in which the effect of legislative authority has been discussed. It will be seen that the language is not imperative, but permissive, and that it does not confer statutory sanction for the commission of a nuisance in any way whatever, and most assuredly cannot be said to confer it in express terms, "or by clear and unquestionable implication from the powers given," so that it cannot be fairly said that "the legislature contemplated the doing of the very act which occasioned the injury, and immunity is not to be presumed from a general grant of authority."

But it is said that the decision in this case, if permitted to stand, will "practically debar the use of many of the most important and developing features of our modern growth."

It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to influence their judgments further than to serve as warnings and incentives to thorough ⁵⁰ investigation and careful consideration of the causes submitted to them, Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and

say with the great Lord Mansfield, "Fiat justitia, ruat coelum."

Reversed.

Rehearing denied.

The Question of What Constitutes a Public Nuisance is discussed at length in the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 195.

TIDEWATER QUARRY COMPANY v. SCOTT.

[105 Va. 160, 52 S. E. 835.]

CONVERSION—Remedies.—An owner may maintain an action of tort to recover damages for the conversion of his property, or he may treat the conversion as a sale and bring *indebitatus assumpsit* for its value. (pp. 865, 866.)

SETOFF.—Damages Readily ascertainable by calculation or computation may be set off against a liquidated demand. (p. 866.)

SETOFF—What Constitutes.—It is not necessary, to constitute a valid setoff, that a price should be agreed upon for an article sold and delivered. (p. 866.)

SETOFF, When Allowed.—If *indebitatus assumpsit* can be maintained for the value of property converted, such value may be allowed as a setoff. (p. 867.)

SETOFF—Liquidated Demand.—In an action at law for a liquidated demand, the defendant may set off the value of goods belonging to him which the plaintiff has tortiously converted to his own use. (p. 867.)

BILL OF PARTICULARS—Sufficiency.—A statement of particulars is sufficient if it fairly and plainly gives notice to the adverse party of a cause of action or defense not sufficiently described in the notice, declaration or other pleading. (pp. 867, 868.)

R. R. Hicks, for the plaintiff in error.

E. R. Baird, for the defendant in error.

¹⁶¹ HARRISON, J. Two questions are raised by this record: 1. Can a defendant in an action at law set off against a liquidated demand the value of goods belonging to the defendant, which have been converted by the plaintiff to his own use? And 2. If the value of such goods can be set off, are the items of offset so described in the statement of defense as to entitle the defendant to prove them?

The plaintiff Scott brought an action of assumpsit against the defendant quarry company to recover a sum alleged to be due on a note, and a balance due on open account.

The defendant filed a plea of nonassumpsit and a notice of setoff. The items of the account of offsets that are called in question were stated by the defendant in his account filed as follows:

450 tons of crushed stone, sold to Charles E.	
Scott, at fifty cents per ton	\$225 00
300 tons of crushed stone, sold to same, at	
fifteen cents per ton.....	45 00
There barrels of grease and oil, sold to same.	60 00
Seven cases of dynamite sold to same....	49 00
One carload of coal, sold to same.....	200 00

Upon the trial the defendant, to sustain these items of off-set, introduced a witness to show that the goods mentioned ¹⁸² were upon the premises of the defendant company at the time the plaintiff took possession thereof under a lease; that the goods were worth in the aggregate five hundred and seventy-nine dollars; and that the plaintiff had taken possession of them, and converted them to his own use. The plaintiff objected to the introduction of this evidence upon the ground that it tended to establish a claim for damages that could not be set off in this suit, and upon the further ground that it related to matters not sufficiently described in the statement of defense.

We are of opinion that it was error to sustain the objection on either of the grounds mentioned.

Section 3298 of the Virginia Code of 1904 provides that "In a suit for any debt, the defendant may, at the trial prove and have allowed against such debt any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise."

This court has held that this statute should be liberally construed, with a view to the furtherance of its obvious policy, which is to prevent a multiplicity of suits, and as far as conveniently can be done to effectuate in one action complete justice between the parties: *Allen v. Hart*, 18 Gratt. 722.

For the conversion of its property by the plaintiff, an action of tort to recover damages could have been brought

by the defendant. This mode of redress, however, the defendant had the right to waive, and to bring *indebitatus assumpsit* for the value of the goods. The law will imply a contract to pay for property belonging to the defendant which has been taken possession of by the plaintiff and converted to his own use.

The plaintiff insists that the items of setoff which are sought to be established by the defendant constitute an unliquidated demand, which cannot be set off in an action at law against a liquidated demand.

¹⁶³ It is well settled that uncertain, unliquidated damages cannot be set off to a demand certain. But what are certain, unliquidated damages?

In *Butt v. Collins*, 13 Wend. (N. Y.) 139, 156-157, it is said: "They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case; they are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on a warranty in the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling-house; for unskillfully working the raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury: *Hewlet v. Strickland*, 1 Cowp. 56; *Freeman v. Hyatt*, 1 W. Black. 394; *Weigall v. Waters*, 6 Term Rep. 488; *Livingston v. Livingston*, 4 Johns Ch. (N. Y.) 287, 8 Am. Dec. 562; *Hepburn v. Hoag*, 6 Cow. (N. Y.) 613. In these and like cases there is no data given for computation; nor can the damages be ascertained by any mode of calculation. It is otherwise as to the amount due on a note, or on a merchant's account, or for work, labor and services, or for a yard, a piece or a bale of flannel; the damages in such cases can be readily ascertained by calculation": *Barbour on Setoff*, 82.

In *Waterman on Setoff*, section 286, it is said: "It is not necessary, in order to constitute a valid setoff, that a price should be agreed upon for an article sold and delivered. Therefore, a demand for the value of corn delivered may be set off, though the price of the corn had not been agreed on.

The fact that the price had not been agreed on did not make it a case ¹⁶⁴ of unliquidated damages, within the sense in which these terms have been used in expounding the English statutes. The defendants' demand was for money, the value of the corn. For its recovery indebitatus assumpsit could be maintained, and this furnishes a test in favor of its allowances as a setoff": *Smith v. Huie*, 14 Ala. 201; *Gunn's Admr. v. Todd*, 21 Mo. 303, 64 Am. Dec. 231; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782; *Raysdale v. Buford's Exrs.*, 3 Hayw. (Tenn.) 192; *Hill v. Perrott*, 3 Taunt. 274; *Allen v. United States*, 17 Wall. 207, 21 L. ed. 533; 5 *Robinson's Practice*, 964, 965; *Wait on Actions and Defenses*, 482-484; 2 *Sedgwick on Damages*, 368.

In the light of these authorities the defendant had the right to waive its action for damages against the plaintiff for his tortious act in converting the property of the defendant to his own use, and to bring indebitatus assumpsit for the value of the goods appropriated and, therefore, had the right to offset the plaintiff's demand with the value of such goods. Setoffs are to be encouraged; they lessen the amount of litigation by preventing circuity of action. There is no reason or propriety in driving these parties to cross-actions and to compel the claims to be settled in two suits, when full and equal justice can be awarded to each of them in one suit.

We are further of opinion that the contention that the defendant's demand is not stated with sufficient clearness in its statement of defense cannot be sustained. The defendant, as it had a right to do, chose to treat the plaintiff as a purchaser of the property he had converted to his use and to sue for its value. Each item is described with particularity as property sold to the plaintiff, and the form and substance of this statement of defense could not fail to furnish the plaintiff with adequate notice of the defense that would be made on the trial.

¹⁶⁵ The object of the statute (section 3249 of the Code) was simply to give the plaintiff more particular information of the ground of defense than is generally disclosed by a plea, so as to enable the parties to prepare more intelligently for the trial, and to prevent surprises which may and often do result in injustice. But such statement does not constitute the issue to be tried, and it was not intended that the particulars of the claim, or the ground of defense, should be

set forth with the formality or precision of a declaration or plea, but only in such manner, however informal, as would fairly and plainly give notice to the adverse party of its character when the same was not so described in the notice. declaration or other pleading: *Columbia Acc. Assn. v. Rocky*, 93 Va. 678, 25 S. E. 1009.

For these reasons the judgment complained of must be reversed, and the case remanded for a new trial in conformity with the views expressed in this opinion.

Setoff as a Matter of Right did not exist at the common law, but is a creature of statute, which cannot, it has been held, be construed to meet cases not specially included in its terms: *Drennen v. Gilmore*, 132 Ala. 246, 90 Am. St. Rep. 902; *Bradley v. Smith*, 98 Mich. 449, 39 Am. St. Rep. 565. Statutes authorizing counterclaims should be construed liberally: *First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828; *McHard v. Williams*, 8 S. Dak. 381, 59 Am. St. Rep. 766.

Unliquidated Damages are not a Subject of Setoff: *Smith v. Washington G. Co.*, 31 Md. 12, 100 Am. Dec. 49; *Rice v. Sanders*, 152 Mass. 108, 23 Am. St. Rep. 804. However, the value of a note received for collection and converted is a subject of setoff, and is not unliquidated damages: *Gunn v. Todd*, 21 Mo. 303, 64 Am. Dec. 231.

NEWPORT NEWS AND OLD POINT RAILWAY AND ELECTRIC COMPANY v. CLARK.

[105 Va. 205, 52 S. E. 1010.]

NEGLIGENCE—Obstructing Sidewalk.—If a street railway company, as a warning to the public, stretches a rope across the sidewalk in plain view while it is repairing its poles placed inside the curbing, and a child between nine and ten years of age runs against such rope, sustaining fatal injury, the company is not guilty of negligence per se, and there can be no recovery against it, since the accident is one that could not reasonably have been expected. (pp. 869, 870.)

S. G. Cumming, for the plaintiff in error.

O. D. Batchelor and W. H. Power, for the defendant in error.

206 WHITTLE, J. The circumstances leading up to the accident which terminated in the death of plaintiff in error's intestate are as follows:

In compliance with the requirement of the municipal authorities, the plaintiff in error had removed its poles inside the curb line of the sidewalk along Mallory street, in the town of Phoebus. Subsequently, on the morning of the accident, while the company's linemen were engaged in repairing and stringing wires on the poles, by its order, a rope three-fourths of an inch in diameter was stretched across the sidewalk, one end of which was attached to the blind hinge of a building and the other to one of the company's poles about four feet above the surface of the pavement. The object in erecting this barrier was to warn pedestrians not to pass under the poles on which the men were at work, and thus to protect them from molten lead used in repairing wires, and from tools carried up on the poles by the linemen, which were liable to fall upon and injure persons passing along the sidewalk beneath.

Between 8 and 9 o'clock in the morning, shortly after the rope had been adjusted, plaintiff's intestate, a girl between nine and ten years of age, while running with a companion on her way to school, came in contact with the rope, which passed under her chin, and she was thrown backward upon the pavement, sustaining injuries from which she died two days after the accident.

The jury found a verdict for the plaintiff, upon which the judgment under review was rendered.

From this outline of the salient facts of the case it is obvious that the plaintiff has failed to establish actionable negligence on the part of the defendant. Though it involved a temporary obstruction of the sidewalk at the time of the accident, the company was engaged in lawful business; indeed it was discharging ²⁰⁷ a duty imposed upon it by the town authorities. The work was attended with some danger to those who might pass along and use the sidewalk at that point, and the law devolved upon the company the duty of exercising ordinary care for their protection: Elliott on Roads and Streets, 2d ed., sec. 717; Smith's Modern Law of Municipal Corporations, sec. 1310g; Nolan v. King, 97 N. Y. 565, 49 Am. Rep. 561.

The instrumentality (a three-quarter rope) employed for the purpose of warning the public was not per se a dangerous appliance. It was manifest to the ordinary observer and, in the light of experience, the accident which befell the child could not reasonably have been anticipated. The uncontra-

dicted evidence and collective experience of all the witnesses who testified on the subject is that they had never known or heard of such an accident before.

In the case of *Sjogren v. Hall*, 53 Mich. 274, 278, 18 N. W. 812, Judge Cooley observes: "The fact that it [the accident] was avoidable does not prove that there was fault in not anticipating and providing against it. If a farm laborer falls from the hay mow, the fall does not demonstrate that the farmer was culpable for not railing the mow in. A man stumbling in a blacksmith-shop might have his hand or even his head thrown under the trip-hammer, but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injury impossible. . . . If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not."

²⁰⁸ It plainly appears that the instruction of the court and verdict of the jury were founded upon a misapprehension of the evidence of a single expert witness, who testified that in addition to stretching a rope across the sidewalk, it was customary to station a guard there also to warn the public. But the warning contemplated by the witness was manifestly against the danger of walking under the poles where the men were at work and being struck and injured by falling substances, and not the remote contingency of injury from contact with a rope plainly visibly to anyone using ordinary care for his own safety.

In view of the lack of evidence to sustain the verdict in any aspect of the case, it is not deemed necessary to notice the remaining assignments of error.

The judgment must be reversed, and the case remanded for a new trial.

Negligence is the Absence of Care under the circumstances: *Kinter v. Pennsylvania R. R. Co.*, 204 Pa. 497, 93 Am. St. Rep. 795; *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751. It is a failure to exercise such reasonable care as would be exercised by a person of ordinary prudence under the circumstances: *Tully v. Philadelphia etc. R. R. Co.*, 2 Penne. (Del.) 537, 82 Am. St. Rep. 425; *Brotherton v.*

Manhattan Beach Imp. Co., 48 Neb. 563, 58 Am. St. Rep. 709; Harker v. Burlington etc. Ry. Co., 88 Iowa, 409, 45 Am. St. Rep. 242. It is no more than the failure to observe, for the protection of another person, that degree of care, precaution and vigilance which the circumstances demand, whereby such other person is injured: Barrett v. Southern Pac. Co., 9 Cal. 296, 25 Am. St. Rep. 186. Negligence is a relative term: Kelly v. Michigan Cent. R. R. Co., 65 Mich. 186, 8 Am. St. Rep. 876; Hayes v. Gainesville etc. Ry. Co., 70 Tex. 602, 8 Am. St. Rep. 624. It will not be imputed to one who takes all the care which prudent circumspection suggests to avoid an injury: Sullivan v. Vicksburg etc. R. R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239.

WALKER v. POTOMAC, FREDERICKSBURG AND PIEDMONT RAILROAD COMPANY.

[105 Va. 226, 53 S. E. 113.]

RAILROADS—Turntables.—A railroad company is not liable for an injury inflicted on a trespassing infant of tender years by an unlocked and uninclosed turntable on its premises in an open and unoccupied field some distance from the public highway. (p. 872.)

TRESPASSERS—Liability for Injury to.—A land owner does not owe to a trespasser, whether adult or infant, the duty of having his land in a safe condition for such trespasser to enter upon. He assumes the risks of the condition of the land, and ordinarily has no remedy for harm happening to him. (pp. 872, 873.)

TRESPASSERS—Duty to.—A land owner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. (p. 873.)

RAILROADS—Turntables.—The fact that an unfastened railroad turntable located on unoccupied land belonging to the railroad company is attractive to trespassing infants does not render the company liable for injury to them while playing with such turntable, nor does the maxim "*Sic utere tuo ut alienum non laedas*" apply in such case. (p. 877.)

TURNTABLE CASES.—Doctrine of turntable cases disapproved and rejected. (p. 877.)

Morton & Shackelford and Meredith & Cocke, for the plaintiff.

St. George, R. Fitzhugh and J. G. Williams, for the defendant in error.

227 BUCHANAN, J. This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of the intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange courthouse, located about two hundred and twenty feet from its station or depot; about three hundred and sixty feet from the public road which runs from the depot to the village of Orange courthouse; close by a mill-road, which is not public; fifty or sixty feet from what is known as the horse-show grounds; about three hundred and forty feet from any inhabited house; and in an open and unoccupied field; that boys were in the habit of playing ball on the horse-show grounds, between which and the railway land there was no fence; that boys frequently rode on the turntable, and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident the plaintiff's intestate, who was a little over twelve years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it, and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

Upon the trial of the cause there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not, under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the turntable in the place where it was, on its own premises, unfenced and unfastened.

²²⁸ The general rule is that a land owner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger: *Norfolk etc. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Williamson v. Southern Ry. Co.*, 104 Va. 146, 51 S. E.

195, 70 L. R. A. 1007; Bishop on Noncontract Law, sec. 845; Cooley on Torts, 2d ed., 791-794.

It is not denied, as we understand the counsel for the plaintiff, that such is the common-law doctrine as to adult trespassers and bare licensees; but his contention is that, under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention he relies upon the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and the cases which follow it.

While these cases, which are known as "The Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the *Stout* case (17 Wall. 657, 21 L. ed. 745), has been discussed in numerous cases by the appellate courts of many of the states of this country, with the result that there are many authorities sustaining the doctrine in its broadest sense; while many utterly repudiate it, and others give it a qualified recognition and practically limit it to railroad turntable cases. A question or problem which has given rise to such a wide divergence of opinion is not of easy solution.

²²⁹ As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law and is sustained by the better reason.

In order for the plaintiff to recover in this case it must appear that the defendant company owed his intestate some duty which it had failed to discharge; for where there is no duty there can be no negligence: *Norfolk etc. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996; *Carson Lime Co v. Rutherford*, 102 Va. 244, 46 S. E. 304.

As before stated, the common law imposes no duty upon a land owner to use care to keep his premises in such condition that trespassers and bare licensees going thereon may not be injured. This is unquestionably the rule as to adults, and the weight of authority, as it seems to us, shows that it is the rule as to children.

The cases cited in the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other

rules, or within well-defined exceptions to the general rule that a land owner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the supreme judicial court of Massachusetts, in the case of *Daniels v. New York etc. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, 13 L. R. A. 248, and by Judge Peckham (now of the supreme court of the United States), in delivering the opinion of the court of appeals of New York, in *Walsh v. Fitchburg etc. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724.

The conclusion reached in those cases is fully sustained by ²³⁰ the following cases (and many more might be cited), which are all "Turntable Cases," or cases in which the doctrine of those cases was involved: *Frost v. Eastern R. Co.*, 64 N. H. 220, 10 Am. Rep. 396, 9 Atl. 790; *Delaware etc. Ry. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 837; *Uttermohlen v. Boggs Run etc. Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911; *Ryan v. Tower*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, 55 L. R. A. 310; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573; *Savannah etc. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314.

The same conclusion was reached by this court in *Clark v. City of Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369. The city had made an excavation upon the land of another, into which a child of six years fell and was injured. In denying the child the right to recover in that case it was said that where the excavation is so near the highway that a traveler, by making a false step, or being affected by sudden giddiness, might be thrown into the excavation and injured, there would be a liability. "But if, in order to reach the place of danger, the party injured must become a trespasser upon the premises of another, the case will be different, for in such a case there is no breach of duty from which the liability to respond in damages can result."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation—that is, that if a person is allured, or tempted by some act of a railroad company to enter upon its lands, he is not a tres-

passer; and it is held that leaving a turntable unfastened or unguarded, under circumstances similar to those disclosed by this record is such an act.

²³¹ One of the cases cited and relied on to sustain this contention is the case of *Bird v. Holbrook*, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the land owner was liable. The express object in setting the spring-gun was to inflict injury—to do an intentional wrong.

Another case relied on is that of *Townsend v. Wathen*, 9 East, 277. That was a case where a land owner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business, but as the court said, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure anyone, to the case of a land owner setting spring-guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is, as it seems to us, to lose sight of the difference between negligence and intentional wrongdoing: *Walsh v. Fitchburg etc. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724; *Dobbins v. Missouri* ²³² etc. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573.

"The viciousness of the reasoning," said the court of appeals of New Jersey, in the case of *Delaware etc. R. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41

L. R. A. 837, in discussing this question, "which fixes liability upon the land owner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice Holmes (now a member of the supreme court of the United States), in *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364, 46 N. E. 115, 36 L. R. A. 493: 'Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it'—or hold parties bound to contemplate infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

No land owner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a land owner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, ²³³ Massachusetts, New York, New Jersey, Rhode Island, Michigan and West Virginia. In several other states it is limited in its operation to turntable cases: See *Frost v. Eastern etc. Ry. Co.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Daniels v. New York etc. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, 13 L. R. A. 218; *Walsh v. Fitchburg etc. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, 27 L. R. A. 724; *Delaware etc. Ry. Co. v. Reich*, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 837; *Uttermohlen v. Boggs Run etc. Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911; *Ryan v. Tower*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, 55 L. R. A. 310; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133; *Dobbins v. Missouri*

etc. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573; Savannah etc. Ry. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314.

The maxim, "*Sic utere tuo ut alienum non laedas*," has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as per se justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the land owner, the effects of which extend beyond the limits of his property.

In *Deane v. Clayton*, 7 Taunt. 489, Gibbs, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb; subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of (their) wrongs that I am bound to regard."

In *Knight v. Albert*, 6 Pa. 472, 47 Am. Dec. 478, where an effort was made to apply the maxim to sustain an action by the owner of cattle which had trespassed upon the lands of another and had been injured by reason of the unsafe condition of the property, Chief Justice Gibson said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not, uninvited, interfere with it or enter upon it. . . . If it were not so, a proprietor²³⁴ could not sink a well, or a saw pit, dig a ditch or mill-race, or open a stone quarry or a man-hole on his land, except at the risk of being made responsible for consequential damage from it which would be a most unreasonable requirement": *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481, 87 N. W. 644, 55 L. R. A. 310. See article by Judge Smith on Land Owners' Liability to Children, etc., 11 Harvard Law Review, 349-373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a land owner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the "Turntable Cases" restrict

it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a land owner, who, in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land and at the same time exposing them to serious danger, is guilty of negligence unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all land owners who in the use of their land maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all land owners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law, which had its origin before there were either railroads or turntables, applies only to railroad companies in the use of their lands, upon which they have dangerous ²²⁵ machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the legislature, and not of the judicial department of the government: *Connelly v. Western Tel. Co.*, 100 Va. 5, 93 Am. St. Rep. 919, 40 S. E. 618, 56 L. R. A. 663. The legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common-law rights of the ordinary landed proprietor.

The court of appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said that the doctrine would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them, which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; . . . he who leaves his mowing machine, or dangerous agricultural implement, in his fields; he who maintains a pond in which boys may swim in summer, and on which they may skate in winter—would seem to be amenable to this rule of duty. Climbing, playing at work,

swimming and skating, are attractions almost irresistible to children, and every land owner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the 'Turntable Cases,' if correct, would charge the owner . . . with the duty of taking care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea ²³⁶ of such a duty is novel and startling, causes strong suspicions of the correctness of the doctrine, and leads us to question it": Delaware etc. R. Co. v. Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727, 40 Atl. 682, 41 L. R. A. 837; Turess v. New York etc. R. Co., 61 N. J. L. 314, 40 Atl. 614; Uttermohlen v. Boggs Run etc. Co., 50 W. Va. 457, 88 Am. St. Rep. 884, 40 S. E. 410, 55 L. R. A. 911.

The supreme court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (Keffe v. Milwaukee etc. Ry. Co., 21 Minn. 207, 18 Am. Rep. 393), in the subsequent case of Stendal v. Boyd, 73 Minn. 53, 72 Am. St. Rep. 597, 75 N. W. 735, 42 L. R. A. 288, through its Chief Justice, said: "The doctrine of the 'Turntable Cases' is an exception to the rules of nonliability of a land owner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case (a dangerous excavation filled with water on a city lot, in which a little boy had been drowned), then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

We will conclude this opinion with the following extract from the very able opinion of Judge Denman, speaking for the supreme court of Texas (another of the states which had followed the turntable doctrine), in the case of Dobbins v. Missouri etc. Ry. Co., 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62, 38 L. R. A. 573, as expressing our views: "The difficulty," he said, "about those cases (Turntable Cases) is, that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In those cases the courts yielding to the hardships of individual instances where owners have been guilty of moral, though not legal, wrongs, in permitting attractive and dangerous turntables and waterholes to remain unguarded on their premises

in populous cities, to the destruction of little children, have passed beyond the safe and ancient ²³⁷ landmarks of the common law, and assumed legislative functions, imposing a duty where none before existed. As a police measure the law-making power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed.

The Liability of a Railroad Company for Injuries sustained by children from its turntables which it has left unfastened and unguarded is discussed in the note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 417. Some authorities maintain that a railroad company which maintains an unguarded turntable upon its own land near a public street is not liable to a child of tender years who comes upon the land without invitation and is injured while playing on or about the turntable: Delaware etc. R. R. Co. v. Reich, 61 N. J. L. 635, 68 Am. St. Rep. 727.

WATKINS v. ROBERTSON.

[105 Va. 269, 54 S. E. 33.]

OPTIONS UNDER SEAL—Consideration—Presumption.—An option under seal for the sale of shares of stock in a corporation is in the nature of a continuing offer to sell, and is conclusively presumed to be made upon a sufficient consideration. (p. 888.)

OPTIONS UNDER SEAL—Specific Performance—Damages.—An option under seal for the sale of shares of stock in a corporation, after the agreement is delivered to the offeree, cannot be revoked during the time stipulated for, and if exercised by the acceptance of the offer, within the time limited, the agreement will be specifically enforced, or damages may be recovered for the breach, notwithstanding an attempted revocation. (p. 890.)

OPTIONS Under Seal—Consideration—Estoppel to Deny.—The recital of the payment of a consideration in an option under seal for the sale of shares of stock in a corporation cannot be contradicted nor its sufficiency questioned so as to defeat the operation of the option according to the purpose designated in the contract creating it, in the absence of fraud, illegality or mistake. This rule applies with great force where the right of a third person to enforce the contract and option is involved. (p. 892.)

Coke & Pickrell, F. A. Christian and A. B. Guigon, for the appellant.

Meredith & Cocke, for the appellees.

270 CARDWELL, J. This litigation grows out of the following agreement:

“Memorandum of agreement made this 26th day of October, 1904, by and between W. S. Robertson, of the first part, and S. S. Elam, of the second part.

“The said W. S. Robertson, party of the first part, in consideration of one dollar to them in hand paid by said S. S. Elam, party of the second part, at and before the execution of this contract, the receipt of which is hereby acknowledged, do hereby covenant, contract and agree to sell to the said S. S. Elam, party of the second part, or his assigns, 496 shares of the capital stock of the Watkins-Cottrell Company, at and for the price of \$137.50 per share, and to deliver the same to said second party on payment or tender by said second party to said first party of the purchase money therefor at the said rate of \$137.50 per share; and it is agreed between the parties hereto that the said party of the second part shall have the right to make the said tender or payment of the said purchase money to said first party and thereupon to demand the delivery of the said capital stock until December 1, 1904.

“Witness our hands and seals the day and year first above written.

W. S. ROBERTSON. (Seal).

S. S. ELAM. (Seal).”

271 On the 21st of November, 1904, Elam, in writing and for value received, assigned the above “option and agreement” to Oliver J. Sands, or his assigns, and on the same day and in the same words Sands made a similar assignment of the agreement to Charles H. Watkins, or his assigns.

On the same date of the agreement Robertson executed and delivered to Elam the following paper:

“Oct. 26, 1904.

“Mr. S. S. Elam, Richmond, Va.

“Dear Sir.—Referring to the option given you to-day on my 496 shares of stock in the Watkins-Cottrell Company, at \$137.50 per share, until December 1, 1904, I beg to advise that if the said option is exercised by you or your assigns I will

allow you a rebate of \$3,180.38 on the price named in said option.

Yours very truly,
"W. S. ROBERTSON."

This latter agreement was by Elam, on the 21st of November, 1904, for value received, also assigned to Oliver J. Sands, or his assigns.

The plaintiff, Charles H. Watkins, filed his original and amended bills in this cause for the purpose of enforcing the specific performance of the contract of October 26, 1904, for the sale of the four hundred and ninety-six shares of stock referred to therein; he claimed to have purchased the stock through Oliver J. Sands on November 21, 1904, in accordance with the terms and provisions of the contract; that on the day and year last mentioned the said Sands did in fact purchase said option contract from Elam, paying him therefor the sum of three thousand one hundred and eighty dollars and thirty-eight cents, and ²⁷² took an assignment thereof from him; that Sands, acting in the matter for the plaintiff, approached the defendant, W. S. Robertson, on the day and year last stated and notified Robertson that he, Sands, desired to exercise said option contract by the purchase of the four hundred and ninety-six shares of stock at the price named in the contract, to wit, one hundred and thirty-seven dollars and fifty cents per share, and then and there offered to pay Robertson the full purchase price thereof, but Robertson refused to receive the same, stating that he had already sold the stock to another party; that upon this refusal of Robertson, Sands assigned said option contract to the plaintiff, of which assignment Robertson was at once notified; and that Robertson was also then notified that the plaintiff was ready, able and willing to pay for the stock the full price agreed upon in the option contract, and warned to make no assignment or transfer of the stock to other than the plaintiff. An injunction was prayed for and granted, restraining Robertson, his agents, etc., from selling, assigning or delivering the said shares of stock of the Watkins-Cottrell Company in the bill mentioned, or any part thereof, or in any way parting from the possession of the stock, or the certificates representing the same, until the further order of the court.

The plaintiff being sick at the time his original bill was filed, and unable to confer with counsel, he tendered and was

permitted to file an amended bill. The amended bill adopts the allegations of the original bill, and, in addition thereto, sets out more in detail the negotiations and dealings had between the plaintiff and Elam concerning the purchase of the stock, which plaintiff claims to have made on November 21, 1904, and charges that if the contract of October 26, 1904, should be construed to be an option contract merely, the same was valid and binding upon Robertson and irrevocable by him, it being supported by a valuable consideration, and given under the ²⁷³ seal of Robertson; but if not to be construed to be an option contract merely, it is a bilateral contract, valid and binding upon both parties thereto, whereby Elam, in consideration of a covenant on the part of Robertson to sell him and his assigns the four hundred and ninety-six shares of the capital stock of the Watkins-Cottrell Company at the price therein named, bound himself unconditionally, on or before the first day of December, 1904, to take said stock and pay to Robertson the price agreed upon in said contract therefor, viz., one hundred and thirty-seven dollars and fifty cents per share, less the deduction of three thousand, one hundred and eighty dollars and thirty-eight cents from the purchase price, as provided in the agreement made by Robertson in a letter to Elam contemporaneous with the contract and attached thereto as a part thereof. It is further charged that the sale claimed to have been made by Robertson of the stock in question to a party other than the plaintiff was made long after Elam had agreed to sell the stock to the plaintiff, and that Robertson had in fact never made the sale he claimed to have made to one W. D. Stuart, president of the Richmond Hardware Company, but that Stuart, a rival in the business of the Watkins-Cottrell Company, merely claimed the sale was made to him. Stuart was, along with Robertson, made a party defendant to the amended bill, which prayed for a specific performance of the contract of October 26, 1904, in accordance with the sale made thereunder by Elam to the plaintiff.

It is proper, perhaps, to state that in the bills filed by the plaintiff he charges that by reason of his reliance upon the validity of the contract between Robertson and Elam and an understanding had between himself and Elam, the plaintiff found it necessary to take a trip north at great cost, trouble and expense to make his financial arrangements for paying for the stock, and on or about the 21st of November, 1904, returned

to the city of Richmond ready and prepared to demand ²⁷⁴ the delivery of the stock and pay the purchase price agreed upon therefor, and that this cost, trouble and expense would not have been incurred but for his reliance upon the validity of the contract held by Elam with Robertson and the agreement between the plaintiff and Elam that the plaintiff should have until the twenty-first day of November, 1904, to consummate his purchase of the stock in question; and that the agreement between the plaintiff and Elam to the effect that the plaintiff should have until the 21st of November, 1904, to conclude his purchase of the stock was by a positive contract entered into and made between Elam and the plaintiff on November 14, 1904.

Robertson answered the amended bill by adopting his answer to the original bill, and also denying that any positive contract had been made between Elam and Watkins on November 14th, or that Watkins had, at his own expense, taken a trip north to raise the means of buying the stock, but went there to attend a meeting of the National Hardware Association at the expense of the Watkins-Cottrell Company. Stuart adopted the answer of Robertson as his own; and upon the pleadings in the cause, the exhibits therewith and an affidavit made and filed by Robertson, the lower court, by its decree, reciting that the case would be rendered doubtful by the conflicting evidence of the parties, and by the consent of both plaintiff and defendant, and in pursuance of the statute in such case made and provided, adjudged, ordered and decreed that an issue be made up and tried by a jury at the bar of the court on the twenty-third day of February, 1905, to ascertain whether the alleged purchase of the four hundred and ninety-six shares of the capital stock of the Watkins-Cottrell Company, as claimed in the bills of complaint to have been made by the plaintiff, Charles H. Watkins, was and is valid and binding upon the defendant, W. S. Robertson.

²⁷⁵ Upon the trial of this issue it was found by the jury that the alleged purchase of the four hundred and ninety-six shares of stock in question, as claimed in the bills of complaint to have been made by the plaintiff, Watkins, was not binding upon the defendant, Robertson. Upon the coming in of this verdict, the plaintiff moved the court to set it aside because contrary to the law and the evidence, and again moved the court for leave to file an amended and supplemental bill. The

court, by its decree of March 11, 1905, overruled the motion for leave to plaintiff to file an amended and supplemental bill, because the pleadings already filed sufficiently raised all the questions proposed to be raised by the amended and supplemental bill, and all such questions were presented to the court in the instructions asked for by the complainant on the trial of the issue, and were then, after argument, decided against the complainant; and also overruled plaintiff's motion to set aside the verdict of the jury, and dissolved the injunction theretofore awarded in the cause. From this decree the case is before us for review upon an appeal allowed to the plaintiff in the court below.

At the trial of the issue before the jury the plaintiff (appellant here) took a number of exceptions to the rulings of the court. From the first of these exceptions it appears that after appellant had rested his case, the appellees introduced themselves and one R. E. V. Farrar as witnesses, who were asked sundry questions and made sundry answers thereto, to each of which appellant excepted, and the ruling of the court in permitting these questions to be asked and answers thereto made is assigned as error.

The objection here made to the evidence is on the ground that it elicited from the witnesses hearsay testimony, in that the questions sought to, and the answers did, bring out certain statements made by Stuart to Robertson in the absence of both ²⁷⁶ Watkins and Elam. It is sufficient, under the circumstances, for us to say that this evidence was improper, and we shall not consider it at length, for the reason that the instructions given by the court, as we shall presently see, took the case from the jury.

The next assignment of error is founded upon appellant's second bill of exceptions, which is to the ruling of the court in giving instructions "A," "B," and "C," at the request of appellees.

The theory of Robertson's defense was that the agreement made between him and Elam, which has been above set out, authorized Elam to sell for him (Robertson) the stock in question to one Springer, only, at the price of one hundred and thirty-seven dollars and fifty cents per share, but not to anyone else, and that no consideration was given for this agreement, which he calls an option, and therefore it was not valid and binding upon him (Robertson).

It will be observed that the agreement, or option, in question makes no mention whatever of Springer's name, and while there was some testimony given and improperly admitted to the effect that there was talk between Robertson and Elam concerning the sale of the stock to one Springer, the limitation upon the contract or option as claimed by Robertson has no foundation in fact and could not have been ingrafted upon that agreement except by mutual consent of both parties.

Much has been said, also, in the argument as to Robertson's unfriendliness toward appellant, and that by reason thereof he set about to defeat the sale of the stock by Elam to appellant as soon as he ascertained that it had been made or was contemplated, and that the sale claimed to have been made by Robertson to Stuart was for the purpose of defeating a sale of the stock to appellant, the sale to Stuart being at the same price per share of stock as the sale to appellant. But these matters can have no bearing upon the question to be decided here. The ²⁷⁷ issue in the case is sharply drawn out by the instructions given and refused by the lower court.

As claimed by counsel for appellant, the court, by instructions "A," "B" and "C," practically took the case from the jury and left them no room to bring in a verdict other than they did. "A" told the jury that the papers introduced in evidence (that is, the contract and the letter from Robertson to Elam appended thereto) together constituted an option, and that said option was a unilateral or one-sided contract; that is, set forth certain obligations assumed by the defendant, Robertson, but contained none assumed by or binding upon Elam. "C" made the verdict depend in part upon the disputed questions of fact, whether Robertson subsequently sold the stock to Stuart, and whether Elam assented to that sale; while "B," on the other hand, practically directed a verdict for the defendants, as the facts upon which that instruction is predicated were not disputed by the plaintiff; that is, that the one dollar mentioned in the contract was not actually paid by Elam to Robertson, and that Watkins did not notify Robertson of his purchase of the stock on November 14, 1904, before the attempted withdrawal of the option by Robertson on November 21, 1904.

As opposed to the theory of the case submitted to the jury by these instructions, appellant asked for, among others, three instructions, Nos. 1, 2 and 3, which the court refused. The

first is general in its terms, covering the ground specifically mentioned in Nos. 2 and 3, which latter instructions set forth the grounds appearing on the face of the contract between Elam and Robertson, upon which, the court should, as a matter of law, have told the jury that the paper was an irrevocable option.

If the paper in question is to be regarded as it was regarded by the court below as merely an option given without a consideration—²⁷⁸ that is, an offer to sell—it might have been withdrawn by Robertson before acceptance by Elam, or an assignee of his, by notice to Elam or such assignee; but if given for a valuable consideration it could not have been withdrawn by Robertson before the time specified therein expired: *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep 881, 48 S. E. 891.

In the case cited the contract or option was treated as though the consideration named therein was actually paid on the day the option was written, and, therefore, the case has but little bearing upon the consideration of the question presented here.

Whether the contract here is to be treated as a contract made for a valuable consideration depends, first, upon what force and effect is to be given a contract under seal over a like contract not under seal; and, second, whether the recital in the contract that a valuable consideration had been paid by Elam and received by Robertson estops the latter in a court of equity to set up, as a defense to a suit for the specific performance of the contract, that no consideration was in fact paid therefor.

It is earnestly contended (1) that the paper shown by Elam to, and relied upon by, appellant, was a valid option, supported by the necessary valuable consideration, as evidenced by the solemn representation on its face, and remained in force from the date of the paper, October 26, 1904, to December 1st, following, irrevocable by Robertson; and (2) that Robertson is estopped to deny the recital in the paper that he had received a valuable consideration for its execution, and especially will not be permitted to make this denial to the prejudice of an innocent third party, namely, appellant.

There is much conflict among the authorities as to whether courts of equity will decree specific performance of an executory contract or covenant because it is under seal, where it is not also supported by an actual valuable consideration, and

many of ²⁷⁹ them take the negative view; but, undoubtedly, this is to be ascribed to the fact that the ancient rule of the common law that a seal conclusively imports a consideration has been repealed or modified by statute in most of the states, and text-writers, in citing cases, fail in many instances to make allowance for this fact.

Upon this subject it is said in section 70 of 1 Pomeroy's Equity: "In most of the states all distinction between sealed and unsealed instruments is abolished, except so far as the statute of limitations operates to bar a right of action; in others, the only effect of the seal upon executory contracts is to raise a prima facie presumption of a consideration, while it is still required on a conveyance of land; in a very few, the common-law rule is retained, which makes the seal conclusive evidence of a consideration."

In Virginia we have no statute abolishing or modifying the common-law rule as to the effect to be given to the seal upon executory contracts.

"In a contract under seal, a valuable consideration is presumed from the solemnity of the instrument, as a matter of public policy and for the sake of peace, and presumed conclusively, no proof to the contrary being admitted either at law or in equity so far as the parties themselves are concerned": 3 Minor's Institutes, pt. 2, 139.

We have a number of decisions holding that parol evidence is admissible to show what was the real consideration for a conveyance made of property, where the conveyance was attacked for fraud; but they have no application here and do not impair the force of the statement which we have just quoted from Minor's Institutes to the effect that no proof is to be admitted, either at law or in equity, to overcome the presumption from the solemnity of the contract under seal that the consideration ²⁸⁰ named was actually paid as between the parties to the contract.

The case of Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501, was a suit in equity for the specific performance of a contract for the sale of certain real estate, and the opinion by Mr. Justice Field says: "The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration and,

therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant, by his notice to the defendant, a contract of sale between the parties was completed. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. . . . When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them." The opinion further says that it is recognized that this is not invariably the practice, and that this form of relief is not a matter of absolute right to either party, but is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case.

In *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602, the contract specifically enforced was an offer of A to sell houses to B within a certain period, the contract being under seal, and it was held that the contract was an irrevocable covenant conditioned upon acceptance within the time named. There it was attempted to withdraw the offer before it had been accepted, and four days afterward the plaintiff wrote to the defendant ²⁸¹ that he had purchased in accordance with the offer. The court viewing the contract as an irrevocable covenant conditioned upon acceptance within the time named, because it was under seal, and notice of the acceptance of the offer having been given before the expiration of the time limit, compelled specific performance of the contract. In that case, as in the case at bar, the contention was made that because the defendant could not have compelled the plaintiff to buy before his acceptance of the offer there was a want of mutuality which should defeat the bill. But the court held that the offer being under seal, it was an irrevocable covenant, conditioned upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which the plaintiff could enforce: See, also, *Lawson on Contracts*, 20.

In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, the contract or option was in all respects similar to the contract here, under consideration, except there the offer was to sell land, while here it is to sell shares of stock of the *Watkins-Cottrell Company*; and the suit was for specific performance of the

contract in a court of equity. In the opinion in that case it is said: "Such contracts are perfectly valid and it is now well settled that a court of equity may decree a specific performance of them: *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394. The covenant in the present contract, giving an option to purchase, was in the nature of a continuing offer to sell. It was made under seal, and hence must be regarded as having been made upon a sufficient consideration. When the offer to sell was accepted by the appellant by his notice to the appellees, the contract of sale between the parties was completed, and the appellees were not at liberty to recede from it."

In *Clark on Contracts*, Hornbrook series, second edition, page 23, it is said, upon a number of authorities cited: "Where, however, ²⁸² an offer under seal in the form of an option is delivered to the offeree, the doctrine that it cannot be revoked applies, and if the option is exercised by acceptance of the offer within the time limited, the agreement will be specifically enforced, or damages may be recovered for its breach": *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Fuller v. Artman*, 69 Hun, 546, 24 N. Y. Supp. 13; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Donnelly v. Parker*, 5 W. Va. 301; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

As opposed to the views taken in the authorities to which we have referred, counsel for appellees rely on, among others, the cases of *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133, and *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891. As already remarked, the last-named case did not turn upon the question here under consideration. The first case was decided on the ground that the option contract in question was one-sided and lacking in mutuality, and, therefore, could not be enforced in a court of equity; but in the later cases of *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175, and *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891, the decision in *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133, was practically overruled. Other authorities, text-writers and decided cases seem to sustain the view contended for by appellees and taken by the court below, but as the authorities we have cited as sup-

porting the view contended for by appellant are founded upon what appears to us to be the sounder and safer principles and are more in accord with the few decisions by this court bearing upon the question involved, we conclude that they should be followed.

In 9 Cyclopaedia, at pages 287, 288, it is said: "3. (b) Options Under Seal.—The common-law rule that where an offer is made under ²⁸³ seal it cannot be revoked applies to options given under seal. The seal renders a consideration unnecessary, and if the option is exercised by acceptance of the offer within the time limited, the agreement will be specifically enforced, or damages may be recovered for its breach, notwithstanding an attempted revocation."

In support of this text numerous authorities are cited, and those we have been able to examine clearly sustain the view taken. The same author, in a note on page 288, cites a few cases to show that some of the courts do not attach so much sanctity to a seal, and allow evidence to be produced to show there was no consideration for the offer. Among the cases there cited is *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133.

In referring to these cases, in 6 Pomeroy's Equity, note to section 773, it is said that they must be considered as wrong in principle, overlooking the fact that it is a contract and not an offer, the enforcement of which is sought. With reference to *Graybill v. Brugh* it is said that the case "should rest upon another ground—intervening equitable right of a third party—if it is to be supported." In discussing "Unilateral Contracts—Options," at section 773, the author says: "Courts of equity often speak of enforcing an option as if such enforcement were an apparent exception to the rule of mutuality. In fact, mutuality has nothing to do ordinarily with contracts of option. The option is only a binding offer. The promisor has parted with the right to withdraw his offer. There is nothing to enforce in equity before the exercise of the option, as the promisee has already obtained his right—to have the offer kept open. Upon the exercise of the option, i. e., the acceptance of the offer—and the filing of the bill by the promisee would be one way of exercising it—the option ceases as an option and equity has an ordinary bilateral contract to deal with. Thus it is usually said ²⁸⁴ that an option to renew a lease is enforceable at the will of the lessee having

the option. In fact the lessee must first exercise his option, and then he has a binding contract for the renewal, and not an option. It can make no difference that defendant has tried to withdraw the option. He bound himself not to do so. This view is further supported by the enforcement of an exercised option which was under seal and without actual consideration. The offer being under seal cannot be withdrawn. Upon its acceptance, the court cannot be concerned with the lack of consideration (which is a good defense to specific performance in equity), for it is the contract and not the option that is being enforced."

The adding of the words in brackets takes nothing from the force of the paragraph, because the author is there speaking of offers other than those under seal, which he says cannot, for the reason that they are under seal, be withdrawn.

Coming, then, to the consideration of the second proposition, that Robertson is estopped to deny that the offer made in the paper executed by him and Elam was for a valuable consideration, having recited therein the payment of one dollar: The English authorities maintain that the recital of a valuable consideration in a deed is conclusive. In the United States it seems to be open to question or explanation for many purposes, but for two it is not: First, the recited consideration can never be questioned or contradicted for the purpose of showing that the deed was not founded on a valuable consideration, and so defeat it; nor, second, for the purpose of raising a resulting trust in the grantor. What is meant is that a party making a deed or offer to sell, in writing, cannot himself deny the recital in the paper he executed for the purpose of invalidating his contract or conveyance, or to raise a resulting trust in himself. The recital cannot be disproved, but must be treated as conclusive ²⁸⁵ for the purpose of giving effect to the operative words of the conveyance or offer: *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Devlin on Deeds*, sec. 834.

While, as between the parties to a deed of conveyance, or even an executory contract, the recital of the receipt of the consideration would not preclude a recovery of the purchase money due, in the one case, or the real amount of the consideration in the other, the recital of the payment of a consideration cannot be contradicted so as to defeat the operation of the conveyance according to the purpose therein desig-

nated, unless it be on the ground of fraud or illegality. So the obligor in a bond which expressly acknowledges a consideration is estopped to deny the consideration for the purpose of avoiding the bond in the absence of any fraud or mistake: 24 Am. & Eng. Ency. of Law, 64.

The case of *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 11 L. ed. 326, held that the principle applied to executory contracts not under seal; and to the same effect is *Silver v. Kent*, 105 Fed. 840.

The case of *Guard v. Bradley*, 7 Ind. 600, was a suit for the specific performance of a bond, and the opinion says: "The appellants insist that the bond was without consideration, and that, being merely voluntary, a court of equity will not enforce it. We have no doubt upon the point that a court of equity will not enforce the specific execution of a contract merely voluntary and without consideration, at the instance of a volunteer (citing authorities). But are the obligors in the bond in an attitude to claim the benefit of that rule? We think they are not. This bond or agreement under seal states that the consideration of it is the conveyance made to the obligors by Ezra Guard. By this recital they are estopped, and cannot say it was without consideration: *Trimble v. State*, 4 Blackf. (Ind.) 435; *May v. Johnson*, 3 Ind. 449."

²⁸⁶ The case of *Fuller v. Artman*, 69 Hun, 546, 24 N. Y. Supp. 13, was a suit of an assignee to enforce specific performance of an option under seal, and is, therefore, a case in point. On its face it was recited that the option was in consideration "of one dollar and other valuable consideration, the receipt whereof is hereby acknowledged," though nothing had in fact passed. The opinion says: "The evidence (i. e., that no valuable consideration had actually passed) was no doubt properly excluded. If admitted, it would have done violence to some elementary principle of the law of evidence bearing upon the credit and validity belonging to instruments in writing and under seal. The principles referred to may, perhaps, be embodied in a rule to the effect that while the mere presumption of a consideration which arises from the use of seals in the execution of the instrument is subject to rebuttal (Code Civ. Proc., sec. 840), the expression of a consideration in such instrument is not subject to contradiction for the purpose or with the effect of in-

validating the instrument: *Murdock v. Gilchrist*, 52 N. Y. 242; *Rockwell v. Brown*, 54 N. Y. 210. The recital of a consideration in a deed is conclusive as to the fact that there was a consideration for the deed: *Grout v. Townsend*, 2 Denio, 336; *Murdock v. Gilchrist*, 52 N. Y. 242. The consideration actually paid or promised may be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery, but the existence of a sufficient consideration when expressed in an instrument under seal is not subject to dispute."

As it seems to us, the rule would apply with greater force where the right of a third party to enforce the contract is involved.

Specific performance was decreed in *Matthews Slate Co. v. New Empire Slate Co.*, upon precisely these grounds.²⁸⁷ The principle is applied uniformly to insurance cases where the policy contains a formal acknowledgment of the receipt of the premium upon the ground that this acknowledgment should prevent the insurer from averring and showing nonpayment of the premium for the purpose of denying that the contract ever had any legal existence. Says the opinion in *Basch v. Humboldt etc. Ins. Co.*, 35 N. J. L. 429: "What does this receipt, in its connection with the delivery of the instrument, import, if it does not mean that the payment of the premium is conclusively admitted to the extent that such payment is necessary to give vitality to the contract? Unless this be its meaning, it serves no legal office, for it does not mean that the money has been actually received. . . . This policy of insurance purports to have an effect immediate on delivery, founded on a paid-up consideration; it does not seem competent for the promisor to prove that the acknowledgment is not true, and that the contract never had any existence. . . . The usual legal rule is that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it

as is any other part of the contract; it cannot be contradicted or varied by parol."

In a similar case, *Kendrick v. Life Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728, the court says: "The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to contest the policy on the ground of nonpayment of ²⁸⁸ the premium. In so far as it is a mere receipt for money, it is only prima facie, like other receipts, and will not prevent an action to recover the money, if not in truth paid; but in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy." In support of the principle declared a long list of authorities are cited.

It seems to us clear, both upon reason and authority, that in this case Robertson should not be permitted to deny, certainly as to Watkins, who, in his dealing with Elam, undoubtedly relied upon the positive representation on the face of the contract in question, that he (Robertson) had received the consideration necessary to its validity and binding force. As we view this case, it would be a denial of justice and a pernicious sanction of unfair dealing to hold that Robertson, who had, by his contract in writing, under seal, executed and delivered to Elam, reciting that it was made and executed for a valuable consideration received, bound himself not to withdraw his offer therein made to sell to Elam or his assigns the four hundred and ninety-six shares of the capital stock of the Watkins-Cottrell Company until December 1, 1904, could, after Watkins had been shown the contract, and, relying upon its binding force and effect upon Robertson, before the time limit therein named had expired, accepted the offer and offered to pay the purchase price for the stock, defeat the very object and purpose of the contract by merely showing that the recital in the contract of the receipt of a valuable consideration was untrue. Contracts or options of this character have, at this day, become in common use in the business world, and dealings had in reliance upon them would become very uncertain, risky and undesirable if such a contract, as a matter of law, may be converted into a snare and a delusion by permitting the party making it to withdraw from or ²⁸⁹ break it before it expires by its own terms, as though the contract

were not under seal and did not contain a recital that a valuable consideration had been paid therefor. Safety and fair dealing in transactions of this character require that such contracts be regarded as sacred and as binding upon the parties intended to be bound thereby as other contracts which can only be defeated, impeached or avoided for fraud or illegality.

We are of opinion, therefore, that the court below should have refused appellees' instructions "A," "B" and "C" and given appellant's instructions Nos. 1, 2 and 3.

The refusal of the court to give certain instructions asked by appellant, predicated upon the agency of Elam for the sale of Robertson's stock in question, and submitting that question of fact to the jury, is assigned as error; but in the view we have taken of the case it is unnecessary to consider this assignment. Nor do we consider it expedient to express an opinion as to the weight of the evidence certified in the record, as the case, because of misdirection of the jury and the admission of improper evidence, has to be remanded for a new trial of the issue out of chancery, should the court deem it proper to submit again the issue to a jury.

The decree appealed from is reversed and annulled and the cause remanded to be further proceeded with, in accordance with the views expressed in this opinion.

An Option to Purchase Land, given without consideration may be withdrawn at any time before acceptance, but an option founded upon a proper consideration cannot be withdrawn before the time specified therein has expired: *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881, and cases cited in the cross-reference note thereto; *Frank v. Stratford-Handcock*, 13 Wyo. 37, 110 Am. St. Rep. 963.

Parol Evidence is Admissible to prove the real consideration of a deed: *St. Louis etc. R. R. Co. v. Crandell*, 75 Ark. 89, 112 Am. St. Rep. 42; *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192. It is not competent, however, to contradict the acknowledgment of the consideration in order to affect the validity of the deed in creating or passing a title to the estate granted: *Kendrick v. Life Insurance Co.*, 124 N. C. 315, 70 N. C. 592.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

HARVEY v. RYAN.

[59 W. Va. 134, 53 S. E. 7.]

INJUNCTION.—The Collection of Purchase Money on land may be enjoined when the vendee is in possession under a deed with covenants of general warranty, and the title is questioned by suit prosecuted or threatened, or is clearly shown to be defective. (p. 900.)

INJUNCTION.—The Collection of Purchase Money due the vendor of land may be enjoined, when the vendee has entered into possession under a deed with covenants of general warranty, and a stranger has asserted title to and recovered the property in an action of ejectment which was pending at the time of the purchase. (p. 907.)

Wyatt & Graham, for the appellant.

Simms & Enslow, for the appellees.

¹³⁴ SANDERS, J. On the twenty-first day of June, 1883, M. B. Ryan, by deed with ¹³⁵ covenants of general warranty of title, conveyed to Robert T. Harvey a certain lot in the city of Huntington, in consideration of which Harvey executed his bond for four hundred and fifty dollars, payable to Ryan. Ryan's grantor was one Andrew Griffith, who bought the lot of the Central Land Company.

Harvey placed a dwelling upon this lot shortly after his purchase, and on the twenty-third day of December, 1885. John B. Laidley, claimant of the lot, instituted, in the circuit court of Cabell county, an action of ejectment for the recovery thereof, against Harvey's tenant, and, by an order of court, Harvey was substituted as defendant in the action.

Am. St. Rep., Vol. 115—57 (897)

After the institution of the action of ejectment, Griffith, as assignee of Ryan, brought an action of assumpsit in the circuit court of Cabell county on the note executed by Harvey to Ryan, whereupon Harvey filed his bill, setting up the facts of the purchase, the execution of the note, the pendency of the action of ejectment, and further alleging that some time in the year 1882, John B. Laidley instituted an action of ejectment against the Central Land Company to recover possession of a certain tract of land in the city of Huntington, within which tract was included the whole of the lot in question, and that in said action the supreme court of this state decided that the acknowledgment of the grantor, in the deed to the Central Land Company, was defective, and that in all probability Laidley would be adjudged the lawful owner of the lot in question. The bill, after alleging that Ryan and Griffith were nonresidents and insolvent, prayed that an injunction might be awarded, restraining the prosecution of the action of assumpsit until the matter respecting the title to the lot was adjudicated, which injunction was granted.

The action of ejectment brought by Laidley against Harvey was determined in September, 1900, it being ascertained by the final judgment entered therein that the plaintiff had an estate in fee simple in the lot, and that the value thereof, without improvements, was four hundred and fifty dollars, and the value of the improvements made thereon by Harvey was one thousand dollars. Laidley elected to relinquish his estate in the lot to Harvey, at the value ascertained.

The parties to this suit having all departed this life,¹³⁶ the same was revived in the name of and against the personal representatives of such respective deceased parties.

On the twenty-third day of July, 1904, the executor of R. T. Harvey, deceased, filed an amended and supplemental bill, which, after adopting the allegations of the original bill, and stating the result of the determination of the action of ejectment, alleged that Ryan and Griffith, though often requested, had failed and refused to protect Harvey's title to the lot, and especially the improvements thereon, and that Harvey was compelled to and did pay the judgment, interest and costs, which exceeded any sum which might be due on the purchase money note; that Harvey paid such purchase money, interest and costs through his attorney, Z. T. Vinson, who procured an assignment of the judgment from Laidley to

himself; that after the death of Harvey, without the knowledge of his executor, the lot was advertised for sale under the order of sale entered in the action of ejectment, and sold, and purchased by Rufus Switzer, to whom Vinson had transferred the assignment from Laidley; that the Central Land Company, through its attorneys, had promised to save harmless all of its grantees in the property claimed by Laidley, but the company failing to do so, as to this lot, the executor of Harvey, at the March term, 1904, of the circuit court, procured an order to be entered, showing that the judgment and costs in the action of ejectment had been paid, and the sale was thereupon set aside, and the action dismissed. The amended and supplemental bill averred that Ryan and Griffith were both nonresidents, and died, insolvent, in the state of Ohio, and prayed that the injunction awarded R. T. Harvey be made perpetual, that the action of assumpsit be ordered dismissed, the bond canceled and surrendered, and for general relief.

The administrator of Griffith and Ryan appeared and demurred to the original and amended and supplemental bills, and moved to dissolve the injunction and dismiss the suit, which motions the court sustained, and entered an order to that effect. From this order the executor has appealed.

The single question presented by the bill is, whether or not equity has jurisdiction to grant the relief sought, or ¹⁸⁷ whether the plaintiff should be relegated to his remedy at law. To determine this question it will be necessary to know when equity will enjoin the collection of purchase money due the vendor, when the contract has been fully executed by a conveyance to the vendee, with covenants of general warranty of title. When we have determined this question, the facts will be found to be of easy application. The authorities in the different states are clearly at variance as to when a court of equity will intervene and grant such relief. "It is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of courts and practitioners": High on Instructions, sec. 382. While such conflict exists, yet it is the well-established, if not the universal, rule, that a court of equity will grant such relief in cases of fraud or mutual mistake, or where the covenantor is insolvent, or a nonresi-

dent, or where to permit the collection of the purchase money will result in irreparable injury to the vendee.

In this state, and in Virginia, injunctions have been granted against proceedings to collect purchase money, when there is a complete failure of title, though the vendee is in the undisturbed possession of the property, and the vendor is neither insolvent nor a nonresident, and though no suit by the real owner against the vendee has been prosecuted or threatened. Maupin on Marketable Land Titles, 795, says: "The doctrine that the covenantee may retain the purchase money without suit prosecuted or threatened by the real owner, and with a solvent covenantor to make good the damages when a substantial breach of the covenants has occurred, has received little, if any, recognition without the states of Virginia and West Virginia, where it prevails. It is there rested upon the ground that the covenantee has no adequate remedy at law, there being no right of action on the covenant affirmatively or negatively by way of recoupment or equitable setoff, until eviction. Hence it appears that in those states there may be a condition of the title which would justify an injunction against the collection of the purchase money, and yet would not support the defense of recoupment or setoff at law." The doctrine is now well¹³⁸ settled both in this state and in Virginia, by a long line of well-considered decisions, beginning early in the jurisprudence of the state of Virginia and followed in this state, that the collection of the purchase money will be enjoined when the vendee is in possession under deed with covenants of general warranty of title, and when the title is questioned by suit prosecuted or threatened, or where the title is clearly shown to be defective, but this doctrine has been extended further in these states than in any other jurisdiction. It is said by Judge Green in *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704: "This court has, in favor of a purchaser, gone far beyond anything which has been sanctioned by the courts of chancery in England or elsewhere, in enjoining the payment of the purchase money after the purchaser has taken possession under a conveyance, especially with general warranty. Yet, it has never gone so far as to interfere unless the title was questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective." And this was quoted with approval by Judge

Green, of this state, in *Wamsley v. Stalnaker*, 24 W. Va. 214, and continuing, he said: "This is the view which, according to my understanding of the case, has been followed in Virginia and West Virginia, when the vendee was protected by a warranty of title and had not been evicted."

The case of *Wamsley v. Stalnaker*, is a leading case, giving a review of several of the Virginia decisions upon this subject, which proceed upon the theory that the purchaser should not be required to pay the purchase money where he is in great danger of losing the property. He is not required to take the hazard of the future insolvency of his vendor. No right of action would exist in favor of the vendee until a breach of the covenant, and it being a covenant of general warranty of title, the breach would not occur until actual or constructive eviction. In discussing the question, Judge Green says that Judge Tucker, in *Koger v. Kane's Admr.*, 5 Leigh, 606, questions the right to the remedy where there is a covenant of good title, because such a covenant would be broken the instant it is entered into, if the title should be defective. And Judge Green also says: "Judge Tucker bases this right of a court of equity to enjoin the purchase money, though there is a general warranty deed held by the purchaser, ¹²⁹ if the title is clearly shown to be defective, partly on the ground that on the general warranty the vendee could not sue at law till he was evicted, and seemed to regard it as doubtful whether such relief in equity would be given, if in the deed there were other covenants, which could be sued upon at law before eviction, as, for instance, a covenant for good title; but this point was not decided nor do I know of its decision in any case in Virginia or in West Virginia. It would seem, therefore, that the extension of the right of a court of equity to enjoin the collection of the purchase money by the vendor because of defect of title, however clear, might perhaps be confined to the case when there was no other covenant but the covenant of warranty, and might not be recognized when there were also covenants, on which the vendee could sue at any time at law, such as covenants of good title."

But in reviewing what Judge Tucker said in *Koger v. Kane's Admr.*, 5 Leigh, 606, we find that he used this language: "The jurisdiction thus confessedly exercised by the courts of equity with us results from what may be called the

preventive justice of those tribunals. It arrests the compulsory payment of the purchase money when the purchaser can show that there is either a certainty, or a strong probability, that he must lose that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them. Thus, if the purchaser can show that he has received a deed with general warranty, and that the title is bad, yet if he has not been evicted, he cannot maintain covenant at law, and ascertain his damages before that tribunal, in order then to set them off against the demand. If, indeed, there are covenants of good title, etc., it may be otherwise; and so it may often happen that an action may be brought where there are such covenants of good title, etc., upon which the validity of the title may be tested, and the damages of the party ascertained. Whether in these cases relief could be given in equity, it is not necessary here to say."

It will be observed that Judge Tucker says it is not necessary to decide this question; and, from his language, it would seem to be susceptible of the construction given by Judge Green, if this were all Judge Tucker said on the subject,¹⁴⁰ but continuing, he said: "But where there is only a covenant of warranty, this cannot be done; and hence, I conceive, the party would be entitled to the assistance of a court of equity, where he is full-handed with proof that his title is defective, although he has not yet been evicted."

This would seem to indicate that he thought after eviction there would be stronger grounds for equity jurisdiction. And then, in *Beale v. Seiveley*, 8 Leigh, 658, Judge Tucker says: "With us it cannot be denied that the practice has been more lax. But even with us relief is only given to a purchaser who had obtained his deed, where there had been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior claimant, can show a clear outstanding title or encumbrance."

But even if that decision, in dealing with this question, did place it partly upon the ground that there is no breach of the covenant of general warranty until eviction, and, therefore, no right of action accrues to the vendee, still there is an additional reason why this remedy should be extended—that is, the remedy of the vendee at law is not adequate and com-

plete. If the purchaser should be required to pay the purchase money, and the suit, prosecuted or threatened, should result in a total loss to him of the property, it would then be necessary for him to bring an action for breach of the covenant, while in the meantime the covenantor might have become insolvent. And this would also be true as to a vendee who had been evicted by reason of a superior title before the purchase money had been collected, because, while a right of action for damages would exist to the vendee, upon the covenant, yet the defense would not be available to him in an action brought against him upon a writing obligatory given for the purchase money. The writing being under seal, it imports consideration, and a defense of failure of consideration or want of consideration cannot be interposed to a writing under seal, at common law. Neither could the damages resulting from a breach of the covenant of warranty be relied on as a common-law counterclaim in the nature of recoupment, since the writing sued on is under seal. The supreme court of Virginia, in *Columbia Accident Assn. v. Rocky*, 93 Va. 678, 25 S. E. 1009, says: "But while a defendant, under ¹⁴¹ the plea of nonassumpsit, might give evidence of matter by way of recoupment, or in diminution of the damages claimed by the plaintiff, even to the entire defeat of his action, yet it was not competent for the defendant to recover in that suit any damages he may have shown in excess of the damages of the plaintiff. If he wished to recover such excess, he could only do so in an independent action against the plaintiff: 4 *Minor's Institutes*, pt. 1, 793, 798. Nor was it competent at common law, as against seal contracts, to prove a failure in the consideration of the contract, or fraud in its procurement, or breach of warranty of title or soundness of personal property, but the defendant was driven, as when proposed to recover against the plaintiff any excess of damages, to his independent action at law to recover the damages he had sustained: 4 *Minor's Institutes*, pt. 1, 792; *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Burtners v. Kern*, 24 Gratt. 42; and *Hayes v. Virginia M. P. Assn.*, 76 Va. 225. The object of the act of 1831 was to remedy these defects, and to enable a defendant both to make such defenses to a suit at law on specialties and also to recover against the plaintiff any excess of damages he may have sustained, in order to settle in one suit all the rights of

the parties arising under the contract, and to prevent circuity of action and a multiplicity of suits. Its object was to enlarge the right of the defense, and not to impair any previous right, or to take away such defenses where the law previously permitted them to be made."

And in *Kinzie v. Riely's Exrs.*, 100 Va. 709, 42 S. E. 872, it is held that damages for breach of warranty could not be claimed at common law by way of recoupment, against a sealed instrument: *Sterling Organ Co. v. House*, 25 W. Va. 64; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Watkins v. Hopkins' Exr.*, 13 Gratt. 743. It will therefore be seen that although there is a breach of the covenant of warranty in the deed from Ryan to Harvey, yet he cannot set this up as a defense in the action brought against him upon the purchase money bond, but must rely upon his separate action for damages for a breach of the covenant, and not being able to make this defense to the action of assumpsit, a court of equity will not require him to pay the money to the vendor, and compel him to resort to his action upon the covenant and take the hazard of his vendor's insolvency. We fail to see the reason for such ¹⁴² course. The title to the land has been adjudicated to be in Laidley, and Harvey has been ousted. The property for which the purchase money bond was given has been totally lost to him, and there is no reason why a court of equity should not enjoin its collection. His legal remedy is wholly inadequate. He may pay the money and then sue at law upon the covenant to recover it back, but this could not be a complete and adequate remedy. The vendor, in the meantime, may have become totally insolvent. This risk the vendee will not be compelled to accept, but equity will extend its aid and prevent the collection of the purchase money.

What we have said as to the defenses to a sealed instrument applies to the common-law doctrine, for, under our statute (Code, sec. 5, c. 126), a defendant may plead failure of consideration, fraud in the procurement of the contract, or breach of warranty of title, but this is only concurrent with the equitable remedy, and by section 6 of the same chapter it is provided that such defense need not be interposed at law, and if not so interposed, it can be availed of in equity. By this statute it was not intended that the equitable remedy be taken away, but, on the other hand, it is expressly

reserved. It was only intended to permit such defense to be made at law, at the election of the defendant. Therefore, if equity, before the enactment of this statute, had jurisdiction, it still has jurisdiction, notwithstanding a remedy by defense at law is given by statute: *Knott v. Seamands*, 25 W. Va. 99; *Bias v. Vickers*, 27 W. Va. 456; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; *Kenzie v. Reily's Exrs.*, 100 Va. 709, 42 S. E. 872.

While some cases have been referred to, to support the views herein expressed, yet, to demonstrate more conclusively that the rule is firmly fixed and has been followed in this state since the question was first presented, it may be well to review other cases on this subject. In *Womensdorf v. O'Conner*, 53 W. Va. 314, 44 S. E. 191, it was held that where land was conveyed by deed with general warranty, and the vendee lost the land, that equity will enjoin the collection of the purchase money. Judge Brannon, in delivering the opinion of the court in this case, on page 316, says: "Counsel for O'Conner would impress upon us the law of actions upon a covenant of warranty; would treat this as if it were a suit by Womensdorf to recover back money paid upon the land under a breach of ¹⁴³ warranty. It is not such a suit. It is a suit to enable Womensdorf to keep in his hands purchase money for his indemnity; I should rather say, not for his indemnity, should he lose the land, but to be relieved from paying money for land already irrevocably lost to him." And in *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395, the same doctrine is announced, citing with approval *Wamsley v. Stalnaker*, 24 W. Va. 214. And in the case of *Kinsports v. Rawson*, 29 W. Va. 487, 2 S. E. 85, we have: "Equity will enjoin the collection of purchase money on land on the ground of defect of title after the vendee has taken possession under conveyance from the vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective." It is said in this case to show that the title is questioned by a suit, either prosecuted or threatened, that the bill, on its face must allege the ground on which the threatened suit is based, which must be such as will put a reasonable man in just apprehension of a loss of his land; that the mere fact that some one has asserted claim to the land is insufficient to justify a court of equity in restraining the collection

of the purchase money. And in *Heavner v. Morgan*, 30 W. Va. 335, 8 Am. St. Rep. 55, 4 S. E. 406, it was held that equity will not require a vendee, who has purchased land and taken a deed with covenants of general warranty, to pay the purchase money, when a part of the land sold is claimed by others and the title is defective, but that if the purchaser can show clearly that the title is defective, equity will not require him to pay the purchase money until such defect is removed, or a proper abatement decreed, and citing with approval: *Yancey v. Lewis*, 4 H. & M. 390; *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704; *Koger v. Kane's Admr.*, 5 Leigh, 606; *Clarke v. Hardgrove*, 7 Gratt. 399; *Lovell v. Chilton*, 2 W. Va. 410; *Wamsley v. Stalnaker*, 24 W. Va. 214; and *Kinports v. Rawson*. Also, see the following authorities: *Renick v. Renick*, 5 W. Va. 285; *Thompson's Admr. v. Catlett*, 24 W. Va. 524; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Morgan v. Glendy*, 92 Va. 86, 22 S. E. 854; *Gay v. Hancock*, 1 Rand. 72; *Beale v. Seiveley*, 8 Leigh, 658; *Grantland v. Wight*, 5 Munf. 295; *Richards v. Mercer*, 1 Leigh, 125.

It is argued by counsel that there is no averment of irreparable injury, that while it is averred that Ryan, the immediate grantor of Harvey, is insolvent, yet it is not averred¹⁴⁴ that the Central Land Company, Harvey's remote grantor, is insolvent. The allegation of insolvency has never been one of the requisites for extending relief of this character, and even if it were so, it is averred in the bill that Ryan, the immediate grantor, is a nonresident, having died, in the state of Ohio, insolvent, and the vendee would not be required to pay the purchase money and then resort to his action against a remote vendor. While it is true the Central Land Company conveyed with covenants of general warranty of title, which covenant runs with the land, and of which the vendee could avail himself, yet equity will not permit the collection of the purchase money from him, and compel him to resort to this remedy; and not only that, but the remote grantor would only be liable upon his covenant for the amount of the purchase money paid him, which might, in many instances, be wholly inadequate, even if such remedy should be resorted to. While it is true in this case the consideration paid to the Central Land Company is the same as that

paid by Harvey, yet this cannot alter the case, because the rule must be one of general application, and not one which may be applicable to some cases, and not to others.

We deduce from the authorities that it is clear from the allegations of the bill that equity has jurisdiction to enjoin the collection of the purchase money. The original bill shows that the action of ejectment was instituted for the recovery of the land conveyed to Harvey for which the bond was executed. The amended and supplemental bill shows that the suit was prosecuted to a final termination, which resulted in a judgment in favor of Laidley. Harvey, having made improvements upon the property, the question of the value of the improvements, and the value of the lot, without improvements, was submitted to the jury, and the lot, having been found to be of the value of four hundred and fifty dollars, and the value of the improvements one thousand dollars, Laidley elected to relinquish his title to the lot, and accept its value, and the lot was ordered sold unless the amount at which it was valued was paid by Harvey. Subsequently the lot was sold, but the sale was not confirmed, and Harvey satisfied the judgment. This being so, a court of equity will not require the payment of the purchase money by Harvey, and force him to his action upon ¹⁴⁵ the covenant contained in his deed from Ryan, even if he were solvent, but the fact of his insolvency is an additional reason for equitable interference.

It is claimed that at the time Harvey purchased the lot the ejectment suit was pending, and that this is an additional reason why a court of equity should not entertain him. The deed to Harvey is with covenants of general warranty of title, and although the action of ejectment was pending, yet this will not prevent him from enjoining the collection of the purchase money.

Care should be taken, however, to distinguish the case here from that class of cases in which injunctions to prevent a sale under a deed of trust, whether executed to secure deferred payments of purchase money or to secure general indebtedness, have been freely granted in this state and in Virginia, upon the allegation that there is a cloud upon the title to the land about to be sold. In such cases, the injunction is granted until the cloud on the title is removed. This

is done in the interest of all parties, that there may be no sacrifice of the property, and that the title of the purchaser may be assured.

For the reasons given, we reverse the decree of the circuit court, dissolving the injunction and dismissing the bill, and remand the cause.

A Purchaser of Land who is in undisputed possession, and has received a conveyance of the same with warranty, cannot ordinarily have relief in equity against the payment of the purchase money, on the ground of a defect in the title: *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554; *Coleman v. Rowe*, 5 How. 560, 37 Am. Dec. 164; *Vick v. Percy*, 7 Smodes & M. 256, 45 Am. Dec. 303. An injunction to prevent the collection of the purchase money will not be granted where the purchaser's title is neither threatened by suit nor clearly shown to be defective: *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704. But relief in equity will be given a purchaser against his obligation to pay, if it appears that he holds under a conveyance with covenants of warranty, that he has been evicted by title paramount, and that his grantor is insolvent: *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725. A court of equity may restrain the grantor from collecting the whole amount due for purchase money, if the covenants have been actually broken and he is insolvent: *Woodruff v. Bunce*, 9 Paige, 443, 38 Am. Dec. 559.

AMMONS v. TOOTHMAN.

[59 W. Va. 165, 53 S. E. 13.]

DEEDS—Exceptions and Reservations.—An exception keeps a deed from passing the thing excepted; a reservation reserves something out of the thing granted. (p. 912.)

DEEDS—Exception of Oil-well—Deepening of Well.—If a deed conveys oil in land "except a well now producing oil," and that well, ceasing to be productive, is deepened by the lessee to a different sand rock, the oil produced from such rock is within the exception of the deed. (p. 914.)

George C. Baker, for the appellant.

Moreland & Glasscock and Charles Powell, for the appellees.

¹⁶⁵ BRANNON, J. William R. Shuman and wife owning a tract of land made a lease of it for the production of oil and gas, which lease ¹⁶⁸ came by assignment to the South Penn Oil Company. The lease provided for payment to Shuman

of one-eighth of the oil as royalty. Shuman sold half of this eighth of the oil and died owning the other half of the eighth. Under this lease the South Penn Company drilled two wells on the land, one unproductive, the other productive out of what is called the Big Indian sand. This well was nineteen hundred feet deep, and produced oil in paying quantity. This well was called Well No. 1. On the death of William Shuman and Minerva Shuman, his wife, said half of said eighth oil royalty payable to them under said lease went to three heirs, one of them being Charlotte Toothman. The said tract of land was divided between the three heirs, Charlotte Toothman getting for her share a tract of fifty-seven acres and a fraction; but the oil was not divided, but left in common for the three heirs, the three heirs owning the said half of one-eighth royalty in common. The said producing well was on Charlotte Toothman's separate tract, though the oil therefrom belonged to all three heirs. Charlotte Toothman and her husband made a deed, December 6, 1897, to Corbly Ammons and Isaac Ammons, conveying the said tract of fifty-seven acres in fee, and also conveying one-half of the oil and gas owned by Charlotte Toothman in the entire lands which had been owned by her father and mother, William R. and Minerva Shuman, "except the well that is now producing oil on said land." The language of the deed as to this is as follows: "The second partys is to have one-half of the oil and gas that may hereafter be produced under the land that belonged to Minerva Shuman and William R. Shuman, and the first party reserves the one-half of said oil and gas. This deed means $\frac{1}{2}$ half of the first party interest in said oil & gas, except the well that is now producing oil, on said land."

At the time the deed was made said Well No. 1 was producing oil from the Big Indian sand in paying quantity, but later it ceased to produce oil in paying quantity, and the lessee, the South Penn Company, drilled said well from one thousand to eleven hundred feet deeper, down to a lower and different sand rock stratum from the Big Indian, abandoning the latter sand rock. The deeper sand rock or stratum being known as the Fifth sand rock, not known to be an oil-producing stratum at the date of the deed, as no wells in that section ¹⁶⁷ of the country had then been drilled to that sand or stratum. Said well on reaching that deeper

stratum found oil in paying quantity. The South Penn Oil Company produced oil from this lower stratum and recognized Charlotte Toothman as owning her full share in the oil produced from said lower stratum, and delivered it to her credit to the Eureka Pipe Line Company for transportation, and did not recognize Ammons as having any interest in the oil from that well. Isaac Ammons having sold his interest to Corbly Ammons, the latter brought a suit in equity in Monongalia county against Charlotte Toothman and said two companies for discovery and account for the oil produced from said Fifth sand through Well No. 1, and to have a decree against those liable therefor, and to have a decree declaring him entitled to half the share of oil of Charlotte Toothman produced, or to be produced, through said well from said Fifth sand, the bill thus claiming that the deed from Toothman to Ammons reserves only the Toothman share produced from the Big Indian sand and excepted no oil in the lower sand, but that Ammons was entitled to half of that oil. The court sustained a demurrer to the bill as to this claim of Ammons, and he appealed.

The question is, Does that deed convey to Ammons the half of Mrs. Toothman's share of oil coming from the lower sand rock, or does it except the oil produced from that rock through said well, and exclude Ammons from any interest in that oil? The main argument for the position that the deed confers half of Toothman's interest in the oil from the lower sand rock is, that when the well ceased to produce oil it was an abandoned well, it became a dry hole, and that Toothman's estate in it ceased, and she no longer had any estate in it. For this position the case of *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, is relied upon, because of its holding "The completion of a nonproductive well, though at great expense, vests no title in the lessee." That case refers to the lease. It means that if, under the usual oil lease, a nonproductive well is drilled and abandoned, no estate vests in the lessee. That is not the question or test here. No one can claim that under such lease, if the lessee go on in further exploration, his right is lost. He may go on in a reasonable time. But that is not the question here, because when that well ¹⁶⁸ produced oil in paying quantity from the upper sand, an estate vested in the South Penn Company and remained vested in it. The bill admits that that

well produced oil in paying quantity. Therefore, an actual estate vested in the lessee, and though that well ceased to produce oil from the upper sand, the lessee had an estate still under which it had right to go on lower with the well, and did so. The lessee's right was not lost or abandoned, and neither was Mrs. Toothman's right gone. The lessee chose to retain its estate and well by sinking that well deeper, and its right continued and so did the right of Mrs. Toothman. Her right depended on the right of the South Penn Oil Company, followed it, and was measured by it. As long as that Well No. 1 was a well for the lessee, it was also a well for Mrs. Toothman. That well was not abandoned by the company. But the argument is, not that the lease failed, but that the company abandoned the upper sand; it did not abandon the lease or lose its estate under the lease, but the claim is, that the company abandoned that well so far as the upper sand was concerned. In other words, it claimed that it abandoned that well. This is a very refined argument—very technical. It is argued that when sunk to a lower sand, a quick change was wrought in that well and it became a new well—another and different well from what it had been. This is a very refined and technical argument. It is not a new well, not a different well, in any sense; it is only a deeper well. The nineteen hundred feet which had been bored remained still a part of that well, its greater part. The hole was the same hole in the ground; its identity was not gone. The mouth of the well from which the oil issued was the same. The oil from the lower sand came through that nineteen hundred feet and issued from the mouth of the well, from the Fifth sand, just as it had from the Big Indian sand. The nineteen hundred foot depth and the mouth of the well were used and utilized in the production of the oil from the lower sand. What if the oil came from the lower sand? It came through the nineteen hundred feet, and issued from the old orifice. I cannot see that the identity of the well was lost. A well remains the same well though continued down into the earth deeper. To say that Toothman was tied down by the exception in the deed to oil coming from the Big Indian sand is unreasonable. Where is the language ¹⁶⁰ in the deed that does this? The sinking of the well lower was an eventuality or a contingency not unlikely to occur, and we may say might be regarded as probable. Oil wells are often sunk

deeper. The claim is that Mrs. Toothman in that exception in her deed had her mind only on oil produced from the upper sand, and intended to except only that. Where are the words to speak that intent? The exception is of that well, meaning all oil produced through it, and Ammons was excluded from ownership in that well. The plain intent was to exclude him from any interest in oil produced from that well, come from where it might in the future. Mrs. Toothman may fairly be said to have intended to retain her interest in all oil coming through that well so long as the lessee should operate it by producing oil through it, in whatever manner the lessee might operate that well. There was the lessee actually operating the well at the date of the deed, and to whatever depth the lessee might sink that well, to that depth also the exception in the deed must go. Did the parties mean anything else? In the first place, here is a broad exception of that well, excluding Ammons from oil produced in it. It is an exception, not merely a reservation. Strictly speaking, an exception keeps the deed from passing the thing excepted; a reservation reserves something out of the thing granted. Mrs. Toothman never granted oil in, or to come through, that well. That exception means that the deed was not intended to confer on Ammons any right at all as to that well or its product. I say there is that broad language. Such are the words of the deed speaking the intent under all circumstances. But suppose we seek probable intent outside the words. Suppose Mrs. Toothman had been told that the deed would except only the oil from the upper sand. Do you think she would have agreed to it? Suppose she had been told that if the lessee should bore lower and get a rich stream of oil from a rich sand rock, she would have no interest in it. Think you she would have agreed to it? Did either side mean it? And yet great stress is laid in argument upon a supposed intent to limit the exception to the Big Indian sand, and to make the deed pass to Ammons from the Fifth sand. I say the inference is very strong against any such intent. If we grope about for intent outside the words of the deed, it is much more reasonable to say that Mrs. ¹⁷⁰ Toothman intended to retain all her oil in that well, come from what depth it might, than to limit herself to one sand rock and give to Ammons all oil below it. The deed does not mention any sand rock. To say that it refers to only one is going outside the deed and

making the deed do what its words do not do. I would emphasize the fact as important that when that deed was made the well was in actual operation producing oil, with a vested estate in the lessee to continue that well to a lower depth, and as Mrs. Toothman excepted that well her right was co-equal with that of the lessee and followed the lessee's right as long as it existed. It was not a new well to the lessee, neither was it a new well as between Mrs. Toothman and Ammons. A lease in 1831 was made to mine coal in lands. Under it two seams were opened and mined. In 1834 a will gave the widow of the lessor "rents, issues and yearly proceeds for life" in the lands. In 1856, the lease being nearly expired and the coal in the two seams which had been worked becoming exhausted, a new lease was made, and under it the mine was sunk to another seam of coal, the Brockwell seam, at a depth of one hundred and eighteen fathoms below the seam which had been opened. That seam was utterly unknown until 1846. The question was, Did the widow have right, as life tenant, in that lower seam of coal under the rule that a life tenant can work to exhaustion on a coal mine opened when the life estate vests? It was claimed, as in this case, that this different seam of coal far below the upper ones was a new mine, not one opened at the date of the commencement of the life estate. The widow was held entitled to the rents of the lower vein, because the deeper excavation was only a continuance of the old mine. The opinion says: "I am clear that this is the old mine. *Clavering v. Clavering*, 2 P. Wms. 338 (a), did not confine the right to one seam. If there be one shaft by which you can work five seams, and which are all let, but only one is worked at first, I am of opinion that when the lease begins to work the other seams it cannot be said to be opening a new mine. I have no doubt that it is substantially and practically the old mine. I agree that if a man has opened a shaft for winning coal, and he finds in another part of his estate mines of lead or ironstone, which could not be got by means of the old shaft or opening, this would be opening a new mine; but here the lessees were at ¹⁷¹ liberty to open other shafts, and to work all coal and ironstone, and I think that this is only a repetition of the working of the old mine"; *Spencer v. Scurr*, 31 Beav., 334. Just so in this case. Here the South Penn had bored to a certain stratum or seam at the date of this exception. It

went on down to another stratum and the rights of Mrs. Toothman went with the South Penn's rights into the lower oil stratum. Mrs. Toothman intended to keep to herself all of her share of the oil produced in that well then being worked by the lessee, and neither of the parties contemplated that her right should stop at the Big Indian sand. No such idea was in their heads. The deed does not do so.

I cite *Crouch v. Puryear*, 1 Rand. 258, 10 Am. Dec. 528, not as conclusive, but as leaning in favor of the position above taken. The syllabus says the life tenant may sink new shafts into the same veins of coal, and that he may go through a seam already opened, and dig into a seam that lies under the first. The seams were separated by slate. How thick does the slate have to be to make it another vein? Certainly the case goes that far. But the answer set up right under the life tenant "to sink new shafts and pursue the coal in every direction and to every extent they may think proper to obtain the coal." The answer claimed that all the coal in the land was part of the same mine. The attorneys argued that the word "mine" "included the whole mass or vein of coal contained within the land." The court simply dissolved the injunction specifying no reason. So, we may say the court took this view. The syllabus was not prepared by the court. If there be a shaft into a vein of coal, and the life tenant exhaust it, must he do without coal when by extending his shaft to a lower vein he can get it? The words "the well now producing oil" are not descriptive of the oil; they do not merely mean the oil now being produced; they do not describe the oil to be produced from any particular sand; but they were used to describe and identify the well. They were intended to exclude Ammons from a particular well.

Decree affirmed.

The Term "Exception," as Used in a Deed means some part of the estate not granted, while the term "reservation" means something taken back from the thing granted: Pritchard v. Lewis, 125 Wis. 604, 110 Am. St. Rep. 873. The two words, however, are sometimes used interchangeably. Thus a provision in the descriptive clause in a deed that "the grantor reserves the ownership of the well on or near the east line of the lot hereby conveyed," constitutes an exception from the premises conveyed: Elsea v. Adkins, 164 Ind. 580, 108 Am. St. Rep. 320.

STATE v. DORR.

[59 W. Va. 188, 53 S. E. 120.]

RECOGNIZANCE.—Oyer is Demandable of a record and recognizance. (pp. 916, 917.)

RECOGNIZANCE—How Entered into.—A recognizance is an obligation entered into by the prisoner and his recognizers appearing before the court or justice and acknowledging themselves to be indebted to the state in a certain sum, upon a certain condition, which is entered and becomes a part of the record. (p. 917.)

RECOGNIZANCE—Manner of Taking Forfeiture.—A recognizance conditioned that one accused of crime shall appear before the circuit court on the first day of a specified term, and not depart thence without leave of court, can be forfeited only by calling him on the recognizance sometime during the term, and entering his default of record if he fails to appear. (p. 920.)

RECOGNIZANCE—Time of Taking Forfeiture.—If the term of court at which one accused of crime is recognized to appear adjourns without his default being entered, the recognizance cannot thereafter be forfeited, and the recognizers are released from liability. (p. 921.)

C. W. May, attorney general, for the state.

Hall Bros., for the defendants in error.

¹⁸⁹ SANDERS, J. William Kesler, being charged with a felony, had his preliminary hearing before Vincent Hamrick, a justice of Webster county, on the twenty-third day of August, 1904, which resulted in the prisoner being committed to jail to await the action of the grand jury. On the first day of September next thereafter, a recognizance in the penalty of five hundred dollars was executed by Kesler, with the defendants, C. P. Dorr and P. M. McElwain, as his sureties, conditioned for the appearance of the prisoner before the judge of the circuit court of said county on the first day of the next term thereafter, and not to depart without leave of court, and to answer the action of the grand jury upon such charge. At the term of court at which the prisoner was recognized to appear, which was on the eleventh day of November, 1904, an indictment was found and returned against Kesler upon the charge for which he was examined and committed, by the justice. At the next term of court thereafter, which was on the eleventh day of January, 1905, Kesler was called upon his recognizance, and he not appearing, his default was entered, and a scire facias awarded

against the defendants, C. P. Dorr and P. M. McElwain, his sureties, requiring them to appear before the court on the first day of the next term, to show cause why judgment should not be entered against them upon the recognizance. The scire facias being issued and returned, the defendants appeared and craved oyer of the recognizance and record, which it was claimed showed the forfeiture thereof, and of the indictment, and record showing its findings, and thereupon demurred to the scire facias, which demurrer was sustained, and the action dismissed, to which judgment the state applied for and obtained a writ of error.

There are several reasons advanced by the defendant in error to support the action of the court in sustaining the ¹⁸⁰ demurrer and dismissing the action, one of which is that the bond was given for the appearance of Kesler at the next term of the circuit court thereafter, which was held in November, 1904, and at that term he was not called upon his recognizance, and his default entered of record, and not having been so called, the fact that he was called at the succeeding term, held in January, 1905, and his default entered, could not operate to forfeit the recognizance. In disposing of this question, it will be necessary to know what the circuit court, in passing upon the demurrer, should have considered, as it does not appear from the scire facias when the default of Kesler was entered, and the writ awarded. While it is not assigned as error in the petition, yet in the argument, upon behalf of the plaintiff in error, it is insisted that the defendants in error could not claim oyer of the record showing the forfeiture of the recognizance, and the indictment and the record showing its finding, but that in determining the sufficiency of the scire facias upon demurrer, the writ itself, together with the recognizance, after oyer claimed, could only be looked to. Chitty's Pleading, 441, says: "Oyer is not demandable of a record; nor of a recognizance." And in Andrews' Stephens' Pleading, 160, it is also said: "Oyer was formerly demandable, not only of deeds, but of records alleged in pleading, and of the original writ also; but by the present practice it is not now granted either of a record or an original writ." And 2 Saunders' Pleading and Evidence, 839, says: "Oyer is not demandable of a writ, nor of a record."

But whatever question there may be elsewhere as to this mode of procedure, it seems to be the law in this state and

in Virginia that oyer is demandable of a record and recognizance. In *State v. McCown*, 24 W. Va. 625, oyer was claimed of the record upon which the scire facias was founded, which was granted and the demurrer overruled. Judge Green, in delivering the opinion of the court, said: "The record on which the scire facias was awarded is a part thereof, as oyer was claimed by the defendant." And in *Wood v. Commonwealth*, 4 Rand. 329, it is said: "A party may plead nul tiel record, and if, upon inspection by the court, the record is not such as is described in the pleadings, he will have judgment; or he may claim oyer of the record, ¹⁹¹ which makes the record a part of the pleadings in that case (18 Vin. Abr. 184, pl. 20, 21), and when it is spread upon the record by oyer, if the party admits that the record of which oyer is given him is the true record, and relies that it does not support the pleadings or scire facias, it seems to me that he should not deny that there is such a record, by plea; but that he ought to demur, upon the ground that it varies from the pleadings or scire facias." And, also, in the case of *Hutsonpiller's Admr. v. Stover's Admr.*, 12 Gratt. 579, a scire facias was brought to revive a judgment, and defendant pleaded payment, and objection was made by the defendant that the court improperly permitted the judgment sought to be revived to go in evidence, because it appeared that the judgment was against Hutsonpiller alone, while the scire facias set out a judgment against him and Paulser Huber, jointly, and the court, by Lee, J., after saying that it was difficult to determine whether the office judgment was set aside as to both defendants or Hutsonpiller alone, says: "But the question of variance does not in fact arise in this case. To raise it, the party should have pleaded nul tiel record, which would have put the plaintiff in the scire facias to the production of a record such as was alleged; or he should have craved oyer of the record, and demurred"; citing *Wood v. Commonwealth*, 4 Rand. 329. *Commonwealth v. Fulks*, 94 Va. 585, 27 S. E. 498, is where a recognizance was taken by the circuit court, which was subsequently declared forfeited and a scire facias awarded thereon, and upon its return the recognizors appeared and craved oyer of the recognizance, and demurred to the scire facias. A recognizance taken either by a justice or by the circuit court is a matter of record, and we think, under the authorities cited, oyer is demandable of it.

We have throughout this opinion referred to the writing in question as a recognizance, but while we have so referred to it, it is because it has been proceeded upon by *scire facias*. It is not in the common-law form of a recognizance, but is a bond with conditions, signed by the parties and approved by the justice of the peace. It does not even appear that the parties signed in the presence of the justice, or acknowledged it before him. A recognizance is where the prisoner and his recognizors appear before the court or justice and acknowledge ¹⁹² themselves to be indebted to the state in a certain sum, upon a certain condition, which is entered upon the record, and thereby becomes a part of it. While the writing may not be in the form of a recognizance, yet, under our statute, if it possesses the essentials of a recognizance, it cannot be quashed simply for informality. Code, chapter 156, section 20: "No recognizance shall be quashed, or in any manner affected or impaired by reason of any informality therein, if it sufficiently appear therefrom what was intended thereby." And then it is provided in section 10, chapter 162, of the Code that no action or judgment or recognizance shall be defeated or arrested by reason of any defect therein, if it appear to have been taken by the court or officer authorized to take it, and be substantially sufficient. But while these sections thus provide, yet it must be remembered that they speak of a recognizance, and it would seem that it should, at least, have the essentials to constitute it such. A recognizance certainly, whether it assumes the form of a bond or the usual form of a recognizance, should be acknowledged before the court or officer taking it. "A recognizance is an obligation of record, entered into before some court or magistrate duly authorized to take it, with condition to do some particular act. In criminal cases the usual condition is for the accused to appear and stand trial. A bail bond is an obligation under seal given by the accused with one or more sureties, and made payable to the proper officer, with condition to be void upon performance by the accused of such acts as he may legally be required to perform. A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation": 3 Am. & Eng. Ency. of Law, 686, 687. But the question as to

whether or not the bond sought to be recovered upon here should be treated as a recognizance upon which a scire facias could be awarded is not raised by counsel, and we deem it unnecessary to decide this question, because, even putting it upon the ground that it is a recognizance, under our statute, regardless of its informality, still the action of the circuit court in sustaining the demurrer will have to be upheld for another reason.

Code, chapter 156, section 16, provides that where a justice ¹⁹³ considers that there is sufficient cause for charging one with an offense, that the commitment shall be for trial, and the recognizance be for the appearance in the circuit court on some day of the term then being held, or on the first day of the next term thereof, and under section 3 of chapter 162 of the code, it is provided that the bond shall be conditioned for the appearance of the accused before the court, judge or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged, and shall not depart thence without leave of the court, judge or justice. The recognizance in this case is conditioned: "Now, if the said William Kesler shall appear before the judge of the circuit court of Webster county on the first day of the next term thereof, and not depart thence without leave of the court, and shall answer the said action of the grand jury, then this obligation be void, else of force." It is claimed by the defendant in error that the recognizance required the appearance of Kesler at the November, 1904, term of the circuit court, and it became the duty of the court at that term to call the prisoner upon his recognizance, and if he failed to appear, to enter his default upon the record, and declare the recognizance forfeited, and unless this was done, it operated to discharge the recognizors. It appears, as we have observed, that at the November term, 1904, no order was entered showing that Kesler was called upon his recognizance, and that he failing to appear, his default entered of record and his recognizance declared forfeited, but that at the succeeding term, January, 1905, he was called upon his recognizance, and failing to appear, it was declared forfeited, and a scire facias awarded thereon. In determining this question, it will be necessary to consider that part of section 7, chapter 162, Code, which says: "When a person, under

recognizance in a criminal case, either as a party or witness, fails to perform the condition thereof, if it be to appear before a court, his default shall be recorded therein." In *State v. Lambert*, 44 W. Va. 308, 28 S. E. 930, it was held to be necessary to call the accused upon his recognizance, and to enter his default of record, in order to charge the recognizers, and that the record is the only evidence as to whether or not this has been done. But the question as to when the accused should be ¹⁹⁴ called upon his recognizance and his default entered of record has not been decided in this state, but, from the very terms of the recognizance, it would seem that this should be done at the term of court at which he is recognized to appear. In this case, the undertaking of the recognizers was that the accused should appear on the first day of the next term of court thereafter, and not depart thence without leave. Did he appear, and did he depart without leave? There is nothing upon the record which answers this question. If he did not appear, and his case was not disposed of, he should have been required to enter into a new recognizance. Who knows but what the party was present in court every day of the term to answer to any indictment returned against him. He was not called to answer, and the court adjourned without his having been called. Now, can it be said that this provision of the recognizance, which says he shall not depart thence without leave of court, means that the recognizers stipulate that they should be bound not only that he would appear on the first day of the term and during the remainder of that term, but that they should be bound for his appearance from term to term to respond to the indictment, until it was finally disposed of. This certainly cannot be the meaning of this provision, because the condition is that the accused shall appear on the first day and not depart thence without leave of court—that is, not depart the court at that term without leave. And when the court adjourned, without the prisoner having been called upon his recognizance, it would seem that he was given leave to depart. In *State v. Mackey*, 55 Mo. 51, it was held that where, pursuant to the terms of a recognizance, a prisoner presented himself at the term of court therein named, and remained in court during the term, ready to obey its order, and no measures were taken to commit him or otherwise secure his appearance at any subsequent term, on adjournment the bond would be discharged, and

could not be forfeited by the failure of the prisoner to present himself at a subsequent term. It may be said that in the case at bar the prisoner did not present himself. There is nothing to show that he did; neither is there anything to show that he did not do so. We may presume that he did, inasmuch as he was not declared to be in default. An indictment was returned against him at that ¹⁰⁵ term, but he was not called to answer it. This was the time that the defendants in error obligated themselves that he should appear and answer. They did not agree to be bound for his appearance at a subsequent term. The state is the moving party. It is the duty of the state to call for the prisoner to answer the charge if any should be preferred against him. The prisoner has a bond to appear there at that time, and he is supposed to be there, and when his presence is desired, he should be called upon to appear, and if not called and his default entered at that term, his bond cannot be forfeited at a subsequent term: See, also, *State v. Moore*, 57 Mo. App. 662. "If a recognizor fail to appear at the term to which he is recognized, and forfeit is not then taken, it cannot be taken at a subsequent term. The recognizance in such case is inoperative, and the bail discharged." The recognizance in this case was conditioned for the appearance of the accused on the first day of the next term of the circuit court of his county, to answer the state of an indictment for forgery, and abide the order of the court, and not to depart therefrom without leave thereof. This recognizance is equally as broad in its terms as the one we are considering, and there the court held that default must be entered at the term to which the defendant was recognized to appear. To the same effect, see *McGuire v. State*, 124 Ind. 536, 23 N. E. 85, 25 N. E. 11. And, also, in the case of *Swank v. State*, 3 Ohio St. 429, it is held: "A recognizance in a criminal case conditioned 'that the prisoner appear at the next term and thereafter, from day to day, and abide the judgment of the court, and not depart the court without leave,' binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns without making any order, the sureties are exonerated from their recognizance," and, speaking in this case, the court said: "Before the expiration of the term, it is the duty of the state to have the prisoner called, require a new recognizance for his appearance at the next term thereafter, and

on failure of the prisoner to enter into the new recognizance, he should be committed to jail." In the case of *Keefhaver v. Commonwealth*, 2 Penr. & W. 241, Chief Justice Gibson says: "Recognizances, being for the appearance at the next, and not at any succeeding term, are to be discharged at the end of the ¹⁹⁶ term by committing the prisoners, delivering them on bail, or setting them at large. But to avoid the trouble of renewing the security, it is sometimes the practice, when the bail consent, to forfeit the recognizance and respite it until the next term; and this answers the purpose perfectly well." In the case of *People v. Derby*, 1 Park. Cr. Rep. 392, it was held: "A recognizance, conditioned for the appearance of M. at the next court of sessions, to be held in the courthouse at the city of H., to be tried by a jury on two indictments for forgery, is to be construed as requiring the appearance of M. at the next court of sessions to be held in the city of H. and not at the next court of sessions to be held at which a jury shall be summoned. And where such a recognizance was taken in January, 1851, and, at a court of sessions, held in June following, M. was defaulted and his recognizance declared forfeited and ordered to be prosecuted, and in an action on the recognizance, it appeared that a regular term of the court of sessions had been held at that place in March of the same year, though no jury had been summoned to attend at such March term, it was held that no breach of the condition of the recognizance had been shown, and judgment was given for the defendant." In *People v. Hainer*, 1 Denio, 454, it is said: "Where, in a declaration on a recognizance entered into by a party and his sureties for the appearance of the former at the next general sessions, to answer, etc., and to obey the order of the court and not depart without leave, etc., the plaintiffs averred that at the then next term of the sessions, the recognizance was respited and continued until and to a succeeding term, and assigned for a breach, that at such succeeding term the defendant made default in appearing, held, that no sufficient breach of the condition was shown, and that the declaration was insufficient."

In *Goodwin v. Governor*, 1 Stew. & P. 465, it is held that where a party has been recognized to appear at a particular term to answer for a breach of the peace, and the state takes no steps toward a forfeiture of the recognizance (no indictment or presentment being preferred or continuance had),

such failure operates as a discontinuance, and discharges the accused. And, also, in *State v. Murdock*, 59 Neb. 521, 81 N. W. 447, it is held: "A recognizance in a bastardy proceeding, ¹⁹⁷ conditioned that the accused 'shall be and appear before the district court on the first day of the next term thereof, and appear thereat from day to day to abide the order of the court,' is limited to the term at which it exacts the appearance. A continuance of the cause to a subsequent term of court is not within the contract of the recognizance, and, if made, a nonappearance of accused at the term to which the continuance carries the cause is not a breach of such recognizance." The supreme court of Georgia holds: "Before bail in a criminal case can be made liable, the record must show that the principal was called and did not appear": *Park v. State*, 4 Ga. 329.

In view of the conclusion we have reached, it is not necessary to refer to the other grounds assigned in support of the demurrer.

There being no error in the judgment complained of, it is affirmed.

A Recognizance is an Obligation entered into before a court of record or a magistrate, with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation: *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

A Recognizance Conditioned that the Accused Shall Appear and answer the accusation and abide the order of the court, given under a statute declaring that if the accused shall fail to appear at the term of the court to which he is recognized, his recognizance shall be forfeited, the forfeiture may be made at any time during the term, and after as well as before a verdict against him: *Neininger v. State*, 50 Ohio St. 394, 40 Am. St. Rep. 674.

RUFFNER BROTHERS v. DUTCHESS INSURANCE COMPANY.

[59 W. Va. 432, 53 S. E. 943.]

FIRE INSURANCE—Construction of Iron-safe Clause.—In determining what constitutes such an inventory as is contemplated by an iron-safe clause in a policy of insurance, all parts of such clause should be construed together. (p. 926.)

FIRE INSURANCE—Iron-safe Clause.—The Inventory of a stock of merchandise, required by an iron-safe clause in a policy of insurance, is a list of all the articles in the stock, so itemized as to show the kinds and numbers or quantity thereof, with their values. (p. 926.)

FIRE INSURANCE—Iron-safe Clause.—What is an Inventory of a stock of merchandise, within the meaning of that term as used in the iron-safe clause of a policy of insurance, is to be determined in view of the peculiar circumstances of each case. Where a store is opened with an entirely new stock of goods at or about the date of the issuance of the policy, the invoices, giving the quantities of the goods, with their cost prices, may, if preserved for that purpose, constitute an inventory. (pp. 925, 927.)

FIRE INSURANCE—Cancellation of Policy as a Waiver of Forfeiture.—A violation of a clause in a fire insurance policy against increase of hazard is not waived by the insurer canceling the policy by letter at about the date of a fire, on the ground of such violation. (p. 928.)

APPEAL—Judgment by Appellate Court.—The supreme court, on reversing a judgment for the plaintiff, and setting aside the verdict for the insufficiency of the evidence and the refusal of the trial court to direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for the defendant, if injustice will not thereby be done. (p. 930.)

Chilton, MacCorkle & Chilton and Murray Briggs, for the plaintiff in error.

Mollohan, McClintic & Mathews, for the defendants in error.

433 **POFFENBARGER, J.** The Dutchess Insurance Company complains of a judgment for the sum of six hundred and forty-nine dollars and twelve cents, rendered against it by the circuit court of Kanawha county, on the twenty-seventh day of March, 1905, in favor of Ruffner Brothers, assignees of A. Haws and his son, H. H. Haws, who were doing business as The Haws Company.

The policy of insurance, under which the loss sustained by The Haws Company occurred, had covered a frame store building, a stock of general merchandise kept therein, and

⁴³⁴ the store and office furniture and fixtures. The stock of goods so insured was entirely new at the time of the issuance of the policy. After the policy had been in force a short time, an addition to the building in which the store was kept was made for the accommodation of a steam gristmill, and the mill installed therein and operated to an extent not clearly indicated, before the fire occurred. In the meantime, Haws had attempted to obtain insurance on the mill from the agents from whom he had secured the policy on the store. They had declined it, and he had vainly tried to obtain it from another agency. Some days before the fire occurred a member of the firm of Lohmeyer and Goshorn, the agents, had informed him they would give him no insurance on the mill, but they would carry his store at a six per cent rate, which was an increase of four per cent over that of the policy he then had.

The defenses relied upon by the defendant were two in number: 1. Noncompliance with that part of the iron-safe clause which required an inventory to be made within thirty days from the issuance of the policy, unless one had been taken within twelve calendar months prior to the date of its issue; and 2. Violation of that clause of the policy which declared it would become void if the hazard should be increased by any means within the control or knowledge of the insured, unless permitted or waived by an indorsement on the policy or attached thereto.

As constituting substantial compliance with the requirement of an inventory, the plaintiff relied upon his invoices or bills. He reasonably contended that, it being a new store, the first lot of goods having been placed in it but a few days before the issuance of the policy, these bills constituted a complete list, by items, with the values annexed, of all the goods that had been put into the store. At the date on which the first lot was taken into the store and put upon the shelves, the invoices therefor made up as complete and accurate a list of the goods as if they had been relisted into a book. All goods subsequently put in, for which bills were likewise received and kept, were additions to the stock. The purpose and object of an invoice is not very clearly defined in insurance law. Most of the courts in dealing with it simply refer to the legal definition of the term inventory. This falls ⁴³⁵ far short of indicating what it is intended for, the func-

tion it performs between the parties. It seems to me perfectly plain that the requirement is intended to secure, in the interest of the insurance company, and possibly both parties, a basis, or starting point, upon which to found an estimate of the value of the stock in case of a loss. It, of itself, indicates nothing except the quantum and value of the stock at the time of the taking thereof. It does not indicate what they amounted to at any previous or subsequent date, nor the average stock. Having an inventory at a given date, however, and the invoices for goods subsequently put in, the determination of the aggregate value of all the goods in the store at the date of the inventory and those subsequently put in, is a mere matter of addition. All insurance policies on merchandise require the production of the invoices as well as the inventory. Another requirement which goes with the inventory and the bills, as an ally, in working out the estimate, is the book in which the account of sales is kept. After ascertaining from the inventory and the bills for the goods subsequently put in the aggregate as above stated, the quantities and values of the goods sold out of the store are deducted, and thus a fair and reasonable indication, as to the quantities and value of the goods at the date of the fire is obtained. The three clauses of the iron-safe provision require the inventory and keeping of the books and their protection by means of the iron safe. In determining what they mean, what more reasonable view could be taken than that they must be all construed together? Some courts exclude the invoices and deny to them the force and effect of an inventory, upon the fanciful ground that they are no index to the value of the goods. What better evidence of the value of the goods could there possibly be than the bills showing what they had cost? They show the value as agreed upon between the owner of the store and a disinterested third party, while an inventory would show the value according to an estimate put upon them by an interested party, knowing that an inventory was made for the purpose of forming the basis of a claim against the insurance company. I am utterly unable to see any force in that contention. Of course the invoices would not constitute an inventory in the case of a store which has been running for a considerable time. They would
436 not afford any basis upon which to begin the estimate, but in the case of a new store starting simultaneously with the

issuance of the policy, or practically so, the first bill constitutes as good a basis for the beginning of the estimate as an inventory could possibly afford. It has been suggested in one or two instances that if the bills were pinned together and some indorsement made upon them, indicating an intention to treat them as an inventory, they might, on the theory of substantial compliance, be deemed to constitute an inventory. In other words, they constitute an inventory if they are indorsed "inventory"; otherwise they do not. This, to my mind, puts more merit into the name of the thing than it is entitled to. It sacrifices substance to mere form and technicality. What is an inventory is to be determined in view of the peculiar circumstances of the case. What would substantially comply with the requirement in one case would not in another in which the circumstances are wholly different. For these reasons, we are unwilling to follow *Southern Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821, 52 L. R. A. 70, *Fire Assn. v. Materson*, 25 Tex. Civ. App. 518, 61 S. W. 962, and the *Mississippi* case in which the proposition advanced by the attorneys for the plaintiff in error arose, and we hold that the evidence is sufficient to sustain the finding of the jury in favor of the plaintiff on the first issue.

The violation of the clause against increase of hazard is admitted, but it is insisted that there was a waiver on the part of the defendant. The claim of waiver is predicated upon the knowledge which the agent of the defendant company had, at the time of the issuance of the policy, of the intention of the insured to build the addition to the store house and install a gristmill in it, and of the actual consummation of this design before the fire occurred, and upon a letter written by them to the insured, dated the day of the fire, but received on the day after that occurrence. The store was destroyed about 10 o'clock on the night of December 23d, and the letter was postmarked 1:30 A. M., December 24th. It reads as follows:

"A. Haws Esq., City:

"Dear Sir—We again call your attention to policy No. 3379 Dutchess Insurance Company covering on your building, stock and fixtures, which has not yet been returned to us for cancellation. We desire now to ⁴³⁷ notify you that the policy is canceled on account of the gristmill exposure

and of no effect, if you will return it the return premium will be paid to you. The policy referred to is in the name of 'The Haws Co.'

"Yours very truly,

"(Signed) LOHMEYER & GOSHORN."

The claim of waiver is stated in two ways. One is that cancellation of the policy necessarily implies that the party canceling it deemed it to be, at the date of cancellation, in full force and effect, otherwise there would be a contradiction in terms and an inconsistency in conduct. To cancel means to make void, to annul, to destroy, and it is said that that which has no existence or is not valid or of any effect, cannot be annulled, made void or destroyed. The view that a breach of a condition or warranty in an insurance policy does not make it absolutely void, but only voidable, would be a sufficient answer to this contention. Many cases hold that such is the effect: *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481. To the same effect are the decisions in Illinois, Missouri, Michigan and Iowa. If not absolutely void, but only voidable, there would be no inconsistency in the act of cancellation by which it would be utterly destroyed. Moreover, no such implication is recognized by the courts. Deeds, contracts and other instruments are frequently canceled by courts of equity on the express ground that they are void, for some reason shown, by way of removing cloud from title, or preventing some use of the instrument which might be injurious to the plaintiff. Formerly it was held that a court of equity would not cancel a deed or other instrument which was void on its face, but the weight of authority now seems to be that such instruments will be canceled. Appeals are entertained by this and other courts from void judgments and decrees, notwithstanding the apparent implication raised by entertaining them that there is a judgment or decree. In order to put the question beyond doubt and dispose of it upon nontechnical grounds, it may be said there is no contradiction or inconsistency in the act of cancellation, and that it does not raise any implication of the continued life of the policy. It is an absolute right conferred upon the insurer by the terms of the policy independently of any cause. It might be exercised at any time, with or without cause. Therefore, a cancellation does not imply even ⁴³⁸ that there was any cause

of forfeiture, much less the additional fact that such cause was waived. The two things are in no sense connected or interdependent. A cause of forfeiture may be asserted, although no cancellation was ever made or attempted. If there had been no cancellation in this case, the defense could have been set up as fully and unreservedly as it has been. Even if it be admitted that the increase of hazard rendered the policy absolutely void, neither the fact nor the right to rely upon it as a defense had any connection whatever with the right of cancellation; and if we say it rendered it void, the insurer might consistently exercise the right of cancellation in order to preclude the setting up of any claim under the policy, although void. In testing this question it is proper to look beyond the facts of the particular case and see how the theory advanced would operate under other conditions. Take a case in which the insurer knows nothing of the cause of forfeiture at the time of the cancellation. Could it reasonably be said to have waived that of which it had had no knowledge? The argument advanced here would produce a waiver in that case.

The other theory of waiver is that the letter, although not physically attached to the policy, may be deemed in law to be added thereto, and to constitute a waiver in writing by the agents. That they had authority to execute such a waiver, or to grant permission to do that which would increase the hazard, provided they did it by an indorsement upon the policy or a writing annexed to it, is not denied or questioned. Whether, if a waiver, it might be regarded as annexed to the policy, it is not necessary to say; for this paper does not, in express terms, waive the breach of the condition, nor, viewed in the light of the facts and circumstances, can it be construed to be a waiver. Its terms import the exact contrary of a waiver. The reference in it to the mill, as the reason for cancellation, plainly negatives intent to assume the additional risk. The letter expresses dissatisfaction with the conduct of the insured. On account thereof, he is notified that the policy is canceled. There is not a word in the letter which expresses waiver or any intention to waive. There is no reference to liability or a claim of liability on the policy. As to whether the company is liable, or whether it will forego any right to defend on the ground of violation ⁴³⁹ of warranty or condition, the letter is abso-

lutely silent. No reference whatever is made to the respective rights of the parties under it. Moreover, it bears on its face an implication that there had been a previous demand for the return of the policy. It begins by saying, "We again call your attention to policy No. 3379," etc. In point of fact, there may not have been any such demand, but whether true or false, it reflects intent on the part of the writers, and tends to negative any intention to waive the violation of conditions. In point of fact, the insured had been plainly informed that the company would not carry his building and store at the price for which it had issued the policy, and that, in order to obtain a continuation of the protection afforded him by the policy, he would have to pay a premium three times as large. Having given him this notice, the agents might very reasonably have expected him to return the policy and make a new contract. For these reasons, our conclusion is that the letter does not constitute a waiver, and that as the jury predicated its verdict upon the theory of a waiver, as shown by answers to special interrogatories, the court should have set aside the verdict.

The trial court further erred in refusing to exclude the evidence and to instruct the jury to render a verdict for the defendant, for the evidence establishes fully and clearly a violation of the warranty against increase of hazard. The plaintiff admitted the construction of the addition to the store room, the installation therein of a gristmill, the operation thereof and a material increase of hazard. These motions having been overruled, the case went to the jury under instructions, given at the request of both parties. Of the twelve asked for by the defendant, four were given and eight refused, and it excepted. It excepted further to the action of the court in giving one of plaintiff's instructions. In view of the judgment to be rendered here, refusing a new trial, it is unnecessary to examine the instructions.

The reasons which, in the opinion of the majority of the court, justify the rendition of judgment for the defendant here and impel them to refuse to remand the case, with liberty for a new trial, are set forth in the opinion of Judge Brannon in *Maupin v. Scottish etc. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003, and by Judge Sanders in *Anderson v. Tug River Coal Co.*, 59 W. Va. 301, 53 S. E. 713, decided ⁴⁴⁰ at this term. As I wholly dissented in the *Maupin* case (53 W.

Va. 557, 45 S. E. 1003), I expressed no opinion concerning the propriety of rendering judgment for the defendant. Now, however, having carefully examined the authorities, analyzed them as best I can, and reached the conclusion that this action on the part of the appellate court is a violation of well-settled legal principles, as well as a radical departure from the previous practice of this court, I feel called upon to dissent from it and register my protest against it.

In those states in which this practice prevails, no distinction is made between cases in which the sufficiency of evidence to sustain the verdict is tested by a motion to exclude, made at the close of the plaintiff's evidence, a motion to direct a verdict at the conclusion of the whole evidence, and a motion to set aside the verdict after the rendition thereof. They apply it generally, simply saying that as they can clearly see that no better case can be made, or that it does not affirmatively appear that it can be done, they, therefore, refuse to remand. Such is the rule in Illinois, Georgia, Maryland, Michigan, Iowa, Washington and Missouri: *Senger v. Town of Harvard*, 147 Ill. 304, 35 N. E. 137; *Siddall v. Jansen*, 143 Ill. 537, 32 N. E. 384; *Neer v. Illinois C. R. Co.*, 138 Ill. 29, 27 N. E. 705; *Brink v. Morton*, 2 Iowa, 411; *Herring v. Hock*, 1 Mich. 501; *Muddy v. Harper*, 1 Md. 110, 54 Am. Dec. 644; *Gault v. Owing*, 6 Gill, 191; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 758; *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *Carroll v. Interstate Transit Co.*, 107 Mo. 653; *Bernard v. Reeves*, 6 Wash. 424, 33 Pac. 873.

In all the above-named states, except Washington, the practice seems to be settled. In that state, however, a later decision (*Edmunds v. Black*, 13 Wash. 490, 43 Pac. 330) enunciates a contrary doctrine, holding that there must be a remand to the lower court when the evidence is insufficient to sustain a verdict. In that case, there was no evidence whatever to sustain it. In the case of *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873, above cited, the matter seems not to have been discussed, but in the latter case it was, and, upon a careful review of the authorities, the court deliberately decided the question. In Arkansas the statute gives to the appellate court the broad power of rendering such judgments as justice may require. Even under that, the court

took the review that it was unjust, and, therefore, violative of law, to refuse to remand a case upon reversing a ⁴⁴¹ judgment for insufficiency of evidence, since, for aught the court knows, a better case can be made on a new trial: *Pennington v. Underwood*, 56 Ark. 53, 19 S. W. 108. In some other states it has been held that, although the court has the power to refuse a new trial, it will only do so when it clearly appears that the plaintiff cannot better his case. This is the law in Wisconsin, but that court remands, when the verdict is unsupported by any evidence whatever, because it will not assume that the plaintiff cannot furnish the evidence to sustain his declaration: *Wright v. Rindskoph*, 43 Wis. 344. Such is the rule in Texas also: *Willoughby v. Townsend*, 93 Tex. 80, 53 S. W. 581; *Boettcher v. Prude*, 32 Tex. 472.

The best exposition of the rule in Pennsylvania is found in *Little Schuylkill R. R. Co., v. Norton*, 24 Pa. 465, 64 Am. Dec. 672, in which the court said: "The plaintiff's declaration contained a good cause of action, and in such cases where we reverse, we always award a venire de novo, both because he may, on a second trial, find evidence to support his narratio, and because it is necessary to enable the defendant to recover his costs if the plaintiff fail to make out his case in evidence." Some other Pennsylvania cases are cited by the text-writers as being in conflict with this, but they will be found upon examination not to be. One of these is *Miller v. Ralston*, 1 Serg. & R. 309. The action was brought before the debt was due, and the court refused a new trial because it appeared that there was no cause of action nor even a pretense of one. Another is *Griffith v. Eshelman*, 4 Watts, 51. There it appeared from the plaintiff's declaration that he had no cause of action. His declaration was incurably bad. It was not a case of insufficiency of evidence nor one in which the evidence could be considered at all.

One case is cited from New Jersey, *Hinchman v. Clark*, 1 N. J. L. 340, but it stood upon a special verdict, the facts all ascertained. One is cited from Kentucky, *Broadbush v. Broadbush's Heirs*, 10 Bush, 299, in which the court say they will remand except where there is no evidence to sustain the verdict. By what process of reasoning this conclusion was reached is not in any way indicated. Nothing is said about it in the opinion.

In South Carolina the sufficiency of the evidence is tested on the defendant's motion to nonsuit the plaintiff. In ⁴⁴² *Townes v. Augusta*, 46 S. C. 15, 23 S. E. 984, the supreme court of that state, upon mature consideration, announced the rule as follows: "If the nonsuit was improperly refused, and the nature of the plaintiff's demand was such that no recovery could be lawfully had, this court will grant the motion, and dismiss the plaintiff's complaint. If, however, it was merely a case of insufficiency of proofs adduced at the trial to support the cause of action, in itself of a proper and legal nature, this court will not dismiss the complaint upon appeal, but order a new trial, to afford the plaintiff an opportunity to make better proofs." I understand the distinction here stated to be the same as the one made by the Pennsylvania and New York courts, namely, if the declaration sets forth matter which does not, and cannot, constitute a good cause of action, final judgment of dismissal will be rendered by the appellate court, but if the declaration be good or curable by amendment, the case will be remanded.

The procedure in New York is under a statute which authorizes the appellate court to reverse or affirm, wholly or in part, or to modify, the judgment appealed from, and to grant a new trial, if necessary or proper, and to grant to either party the judgment which the facts warrant. Under an authority so broad and discretionary as that, the New York court of last resort has solemnly declared over and over that the appellate court cannot properly render final judgment for the appellant, unless the facts are conceded or undisputed, or are established by official record or found by the trial court, or it appears that no possible state of proof applicable to the issues will entitle the respondent to judgment: *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Edmoston v. McLoud*, 16 N. Y. 543; *Hendrickson v. City of New York*, 160 N. Y. 144, 54 N. E. 680; *New v. Village of New Rochelle*, 158 N. Y. 41, 52 N. E. 647.

Certain decisions of the supreme court of the United States are sometimes cited for the proposition that, on reversing a judgment for insufficiency of evidence, on a motion to set aside, or refusal of a direction to the jury to find for the defendant, it will enter final judgment. This is a misapprehension. Those cases do not assert such a

proposition. In all of them the parties waived trial by jury and submitted the matters in difference to the court. That is equivalent to a demurrer to the evidence. By agreement of the parties, ⁴⁴³ the case is withdrawn from the jury. Both parties voluntarily relinquish the right to a jury trial: *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 7 Sup. Ct. Rep. 460, 30 L. ed. 573; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. Rep. 882, 30 L. ed. 920; *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28 L. ed. 636, cited in the *Maupin* case (53 W. Va. 557, 45 S. E. 1003). In all these cases it is expressly stated that the trial by jury was waived and the case submitted to the court by a formal written stipulation. When the trial is by a jury and the verdict set aside for want of sufficient evidence, the practice in the supreme court of the United States is shown by the decision in *Baltimore etc. P. R. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506. The court held that the evidence disclosed a clear and undisputable case of contributory negligence on the part of the plaintiff. The defendant had failed to ask the court to direct a verdict, but had asked an instruction directing the jury to find for the defendant, if they should find that the plaintiff knew the box-car was the proper place for him and that his position on the pilot of the engine was a dangerous one. The court concluded its opinion as follows: "The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such instruction, and error to refuse." Instead of rendering judgment for the defendant, however, the case was remanded with directions to issue a venire de novo. How much stronger case could be presented than that? There was an affirmative showing by the plaintiff's own evidence of a fact that effectually barred recovery.

In *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780, the court gives a full exposition of the principles upon which the motion to exclude evidence rests. In the concluding part of the opinion, Mr. Justice Miller said: "It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the

preponderating weight is in his favor—that is the business of the jury—but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial.” He then shows the absurdity of requiring the ⁴⁴⁴ submission of the evidence to the jury under such circumstances and says: “In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict.” It is to be observed here that that court says that when a motion to direct a verdict is made, the plaintiff has a right to take a nonsuit. He is not bound to let his case be withdrawn from the jury in that way. He may get out of court, for the time being, for the purpose of bettering his case on another trial.

This court, in *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999, announced the two principles declared by the supreme court of the United States. There was a case of insufficiency of the evidence, one in which the court might have directed a verdict, had it been requested, and this court reversed the judgment, set aside the verdict and remanded the case, suggesting that the trial court, on the same evidence, in another trial, might direct a verdict “first giving the plaintiff an opportunity to suffer a nonsuit if he desired.” When an appellate court, on reversing a judgment and setting aside a verdict for insufficiency of the evidence, whether there has been a motion to exclude at the conclusion of plaintiff’s evidence, a motion to direct a verdict upon all the evidence, or a motion to set aside the verdict, renders judgment for the defendant, it denies to the plaintiff the opportunity to take a nonsuit. In the case of motions to exclude and direct, he is not given an opportunity to better his case in view of the final action by the court, for the reason that he is under no duty to ask for a nonsuit in the trial court, because the court refuses and overrules the motion. His situation is the same as a plaintiff when his declaration or bill is demurred to. As long as the court rules with him, holding his pleadings suffi-

cient, there is a presumption of correctness, upon which he may rely, and he is under no duty to ask leave to amend. It is only when the court says the pleading is insufficient that the party is put under a duty to ask leave to amend. So where the sufficiency of his evidence is challenged by a motion ⁴⁴⁵ to exclude or direct a verdict, as long as the court rules in his favor, he may well suppose that his evidence is sufficient, and is excused from making application to the court for leave to strengthen it. For the court afterward to turn around and render a judgment against him, without giving the opportunity to better his condition, which he could have had in the court below, and of which that court could not have deprived him, is to take him by surprise and do him a rank injustice. Besides, for aught the court can know, except by way of guess, it may grievously injure him. The supreme court of Vermont, in reversing a judgment in which such a motion was made and ought to have been sustained, said: "While we hold that it was the duty of the court to have entertained the defendant's motion to direct a verdict and enter judgment in its favor; and while generally it is the duty of this court to enter such judgment as the trial court should have done, yet, if the trial court had sustained the defendant's motion, the plaintiff might have desired, and been permitted to introduce further evidence, and she may desire to do so on another trial, hence the cause is remanded for a new trial": *Latremouille v. Bennington etc. Ry. Co.*, 63 Vt. 336, 22 Atl. 656. To see how the plaintiff, in such case, may protect himself by exercising his right to take a nonsuit, it is only necessary to bear in mind that the court, in acting upon such a motion, performs two functions. It first determined whether there is sufficient evidence to take the case to the jury. This is a preliminary step. If the court be of opinion that it is not sufficient, then follows the order of exclusion or direction of the verdict. Upon the announcement by the court that, in its opinion, the evidence is insufficient, the plaintiff has an opportunity, before the verdict is rendered under the direction of the court, to take a nonsuit and thereby prevent his case from being taken from the jury by the court in its then condition. He thereby saves to himself his constitutional right of a trial by jury. This principle puts it beyond the power of the defendant and the court to take his case from the jury in that way. Whether that

right is a valuable one to him in a particular case, it is not for the court to say, until the defendant has put himself in a position to authorize such action. Though a court may clearly see that no harm, in a practical sense, will result from forcing a defendant to ⁴⁴⁶ trial on a bad declaration, it can never overrule a demurrer for that reason. He cannot be deprived, for reasons of mere expediency, of his right to require a good declaration or bill before pleading or answering. The law deems that right to be a valuable and sacred one, whether it be so in the particular case or not, and does not permit any court to assert the contrary. Nor can a court properly deprive a litigant of any other legal right, because, forsooth, the judge cannot see how he is injured thereby. By rendering final judgment in such cases as this, the plaintiff is deprived of his opportunity to better his case. It directly and expressly refuses that which the trial court would have been bound to allow him had it concluded the evidence was insufficient. The rendition of a judgment by the appellate court, in such a state of the case, works another injury in a legal sense, by putting the parties on an unequal footing. It enables the defendant to have three chances, one before the court and two before the jury, while the plaintiff has but one, a chance before the court. It allows the defendant to make a demurrer to the evidence against the plaintiff for his own benefit, without subjecting himself to the operation of a demurrer. Upon the court's refusing his motion, he has a chance of a verdict in his favor. If he fails to get that, he comes up to the appellate court, on the issue of law, and has final judgment. If the verdict be for the defendant, however, and the plaintiff is compelled to come to this court to get rid of it, upon reversing the judgment and setting aside the verdict, he cannot have a final judgment against the defendant, but must go back and give the defendant another chance before the jury. Upon what principle an appellate court can justify such a discrimination between parties, I am unable to see. It is to be remembered in this connection, too, that the subject matter of this discrimination is the constitutional right of a jury trial. It is more than a mere matter of form or technicality, even if it could be set aside and ignored as a matter of form. While the courts and text-writers say a motion to exclude or direct a verdict is equivalent to a demurrer to evidence, they do not mean that it is

in all respects equivalent thereto, but only that in determining whether it shall be sustained or overruled, the principles governing a demurrer shall apply. Where the parties join in a demurrer, the case is taken from ⁴⁴⁷ the jury absolutely as to both parties. Neither has any right to go back to the jury, unless there has been error in admitting or excluding evidence. The whole matter is submitted to the court for final determination. What was said above about the inability of the defendant and the court to take from the plaintiff his right to a trial by jury was qualified by the phrase "in that way," namely, by a motion to exclude or direct a verdict. I am not to be understood as intimating that the plaintiff cannot be compelled to join in a demurrer. When he is compelled to do so, however, the other party is also compelled to withdraw his case from the jury, so that both parties stand on an equal footing, forever separated from the jury, and their case wholly in the hands of the court.

Very few of those courts, in which the practice of rendering judgment on a reversal obtains, if indeed any, have given this subject careful and mature consideration. They have dismissed it with a few words, usually with the remark that it is not perceived how the plaintiff can make a better case, or that it does not appear that he can do so, wherefore the granting of a new trial will be useless. I have observed that in one or two instances it has been said that it ought to be done in order to put an end to the litigation; but this reason falls under the condemnation of the great weight of authority. Even the courts that have given it have said in the same breath they would grant a new trial, if they could see that the plaintiff could make a good case, while others have said they would grant it in all instances in which it does not affirmatively appear that the plaintiff could not by any possibility make a good case. All the reasons assigned by all the courts that indulge in that practice may be included in that idea of utility or expediency, which utterly ignores legal principles, and, if extended, would lead to the abolition of all forms of action. It would only be necessary to have a judge and a jury, and all pleadings might be dispensed with. The trial of an equity suit on a declaration in debt would be perfectly justifiable. The suggestion that, as the plaintiff has had one trial, he has no legal right to another, is one advanced for the first time, so far as I am able to see, in Mau-

pin v. Scottish etc. Ins. Co., 53 W. Va. 551, 45 S. E. 1003. I think he has, unless the defendant has taken the proper step to deprive him of it by a demurrer ⁴⁴⁸ to the evidence. Even in that case, it is likely the plaintiff may avoid the effort to bind him, by taking a nonsuit. While he must join in the demurrer or dismiss his action, I do not see that the court can compel him to further prosecute, or elect for him which alternative shall be taken. The statute forbids the taking of a nonsuit after the jury has retired from the bar, but limits the right no further, and I know of no authority in the court to add to it. The right may be of no practical value to him, but it is a legal right of which a court cannot deprive him, except by trampling the law under foot.

Maupin v. Scottish etc. Ins. Co., 53 W. Va. 557, 45 S. E. 1003, is the first decision by this court in which the rule here enforced was ever applied. No precedent for it will be found in any of the Virginia decisions prior to the division of the state. Even a fatal variance between the declaration and the proof was not ground for any such action, though it is in some other states. In Calvert v. Bowdoin, 4 Call, 217, the court laid down this proposition: "If the evidence differs from the statement in the declaration, a judgment of nonsuit will be given by the court of error; and the cause will not be sent back to the court below with a direction to call the plaintiff, or to instruct the jury that the evidence does not support the declaration." Instead of rendering a judgment for the defendant against the plaintiff, and making the matter *res judicata*, the court merely dismissed the action. This is in accord with the rule declared by the South Carolina court and by the Pennsylvania court as above shown.

For these reasons, I am opposed to the departure made in the Maupin case (53 W. Va. 557, 45 S. E. 1003), and in the case of Harvey Coal & C. Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928, 6 L. R. A., N. S., 628, and would remand this case instead of rendering judgment for the defendant. If the defendant desired the case to be taken from the jury, it should have demurred to the evidence and deprived itself of any right to go to the jury, while taking that right from the plaintiff.

BRANNON, J. I concur in the judgment, but I doubt point 2 of the syllabus.

Conditions in Policies of Insurance requiring the insured to keep an inventory of the goods insured have usually been accorded a reasonable interpretation so as not to work a forfeiture if substantially complied with: *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 67 Am. St. Rep. 26. See, also, *Everett-Ridley-Ragan Co. v. Traders' Ins. Co.*, 121 Ga. 228, 104 Am. St. Rep. 99. It has been decided, however, that invoices of goods purchased, covering every article embraced within a stock of merchandise on a given day, is not an inventory of such stock within the meaning of an iron-safe clause which requires the insured to take a complete itemized inventory of stock on hand at least once in each calendar year: *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216.

TROUGH v. TROUGH.

[59 W. Va. 464, 53 S. E. 630.]

DIVORCE—General Demurrer, When Properly Overruled.—Where a bill for divorce has two grounds or matters of relief in that it charges adultery calling for an absolute divorce, and desertion calling merely for a decree of separation, a general demurrer which does not separate these charges is properly overruled, although the bill may be bad because it does not name the parties criminis in adultery, nor give time, place and circumstance. (pp. 940, 941.)

DIVORCE—Denial of Right to Defend Suit.—In an action for a divorce the court has no power, because the defendant has failed to pay suit money and temporary alimony required of him, to strike out and disregard depositions filed by him in defense of the suit, and grant a final decree of divorce against him. (p. 946.)

DIVORCE—Confessions of Adultery made in the country are not admissible in evidence in a suit for a divorce for that offense. (p. 948.)

Hall Bros., for the appellant.

Hines & Kelly, for the appellee.

⁴⁶⁵ **BRANNON, J.** This is a suit by Virginia B. Trough versus Richard L. Trough for a divorce. The bill contains a charge of adultery and also desertion, though the desertion is not for a period to call for an absolute divorce from the bond of matrimony. The special prayer of the bill is for absolute divorce, which was granted, and the defendant appealed.

Demurrer. There is much argumentation upon a demurrer to the bill, based on the claim that the bill does not name the woman with whom the defendant committed adultery, nor does it give time, place and circumstance, and thus wants legal certainty. We do not say whether or not a bill for di-

voice for this offense should contain the name of the participants criminis or other matter of alleged defect of the bill, because the demurrer is general, and there are two grounds of divorce contained in the bill, one calling for full divorce a vinculo matrimonii, the other a partial divorce, divorce of separation, a mensa et thoro. The demurrer does not separate these two causes of suit. It does not aim at the charges of adultery, and being general, it was properly overruled. We again say that where a bill contains two or more matters of suit, one good, one bad, the demurrer must be separate. This has always been law: *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722, 39 L. R. A. 491; ⁴⁶⁶ *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64. The bill contains a prayer for divorce absolute and for general relief, and a divorce of mere separation could be granted under the latter prayer: *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553. Therefore, the demurrer was properly disregarded. Here a question arose in my mind. The decree being for absolute divorce for adultery, based thus on that part of the bill said to be defective, can that decree be sustained? Whilst proper to overrule the demurrer, because some relief may be granted, would a decree standing on the bad part of the bill be good on appeal, in view of the rule put in several cases, that where a bill contains some matter proper for relief, and some not good for relief, a general demurrer is not good, and should not be overruled, as it should be aimed especially at the bad matter; but where the court gives relief justifiable only on the bad matter, it is reversible error? *Turner v. Stuart*, 51 W. Va. 493, 41 S. E. 924. But that says bad "matter," meaning the very substance of the facts on which the bill predicates the relief sought, bad matter not calling for any relief by law, not mere defective statement of matter which does call for relief. In this case the bill charges adultery, the alleged defect being in not naming a particeps and giving time, place and circumstance—a mere defect of specification. That takes the case out of the rule just referred to. We find no error in disregarding the demurrer. It was not acted on expressly, likely owing to inadvertence; but we must regard it as overruled.

An order was made requiring the defendant to pay fifty dollars for counsel fees and fifteen dollars per month for support of the plaintiff and two children, and he failing to pay,

the court decreed that "none of the depositions taken by defendant be read or considered on the hearing of this case." and granted a decree of absolute divorce, giving the plaintiff custody of the three children, commanding defendant to surrender to the plaintiff the custody and control of a daughter who was with her father, enjoining forever the defendant from interfering with the plaintiff in the care, custody and control of the children, decreeing that the plaintiff hold a tract of land and personal property consisting of household goods, cows, hogs, chickens and other property claimed by the plaintiff in her bill, and decreeing costs against defendant. The defendant filed an answer denying all the allegations of the charges involved ⁴⁶⁷ in the divorce, claiming the land and personal property. The defendant took numerous depositions. Had the court power to thus refuse the defendant the right of defense? For refusal of defense it was, since what avail the answer without proof under it? The case involved the dearest rights of the defendant, wife, marriage rights, children, property, personal character—rights of person and property. What had the payment of this money as temporary alimony to do with the merits of the controversy touching those all-important and inestimable rights? Nothing. This action of the court is based on the idea that the defendant in failing to obey the order for payment was in contempt, and that the courts have power to punish contempt, and to enforce their orders, necessarily so, and that they can refuse to allow a plaintiff to prosecute a suit for such disobedience, or refuse a party attacked to defend. There is authority for this proposition. 14 *Cyclopedia*, 795, says that refusal of defense is rarely resorted to, but may be. 1 *Encyclopedia of Pleading and Practice*, 436, says a method to enforce payment "frequently resorted to" is dismissing the plaintiff's bill, or refusing to proceed with the trial, or striking the answer of the defendant from the files and proceeding with the case *ex parte*. These statements are guarded and hesitating. The reason of the matter, the weight of authority, are decidedly against the power to refuse one a defense when attacked. The late work, *Nelson on Divorce*, in section 861, says: "An order for temporary alimony may be enforced by execution, sequestration or by proceedings in contempt. But during the suit the court has the power to enforce its orders by declaring the husband in

contempt and refusing to proceed with the cause until its order is complied with. In some instances the courts have dismissed his petition for a failure to comply with its orders. It is error to refuse a matter of right, such as a change of venue, until the temporary alimony is paid. It is doubtful if the court should refuse to enter a decree of divorce until the temporary alimony is paid. But in some instances this practice has been approved. In many instances the husband's answer has been stricken out for his disobedience of the orders of the court. But this is now considered against public policy; for it prevents that full investigation into the merits of the controversy which is necessary to protect the interest of the state." ⁴⁶⁸ The last expression of Nelson is borne out by *Wass v. Wass*, 41 W. Va. 126, 23 S. E. 527, holding that the state is an implied party to divorce suits, and the court must take care that divorces are not granted contrary to law and without good cause. Bishop on Marriage, Divorce and Separation, section 1095, says: "Taking away privileges in the cause is sometimes employed for enforcing payment. For example, in justifying circumstances, the court may strike out the defendant's answer, or dismiss the plaintiff's complaint, or refuse to proceed with the trial, unless or until its alimony order is obeyed. Possibly some of the cases under these heads have gone too far. The interests of the public, while not prejudiced by what delays the cause or ends it without a trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit." This is so because all law says that public policy looks with aversion on divorces. This principle that the public interest is involved so far that it is deemed a quasi party is fully supported by a note in 30 Am. Dec. 545, and Bishop on Marriage, Divorce and Separation, section 480. Now, you suppress a defense to a divorce suit, and dissolve a marriage on the application of one party, and refuse a defense, and you overturn this public policy. No more effective process to further this result can be conceived. For myself, though not involved in the case, I question the right to dismiss a plaintiff's suit for such contempt, under the nature and structure of our government in America, and especially under our Bill of Rights in our constitution, article 3, section

17: "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." And does not this accord the right to defend when attacked "in person, property or reputation"? But let us, on this grave question, look at further authority. In *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, is a long, learned opinion for a unanimous court reviewing the law under English and American cases for more than a century touching the power of courts to punish contempt of a party in failing to pay money under an order of court, arriving at the conclusion that a court cannot for this cause strike out ⁴⁶⁹ an answer and take the bill for confessed; that it has not the power to summon a party to defend, and having obtained jurisdiction over him "refuse to allow the party to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt." The court held the decree void. In *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, where an answer had been stricken out to a libel of confiscation because the owner of the property was a Confederate, the court said, referring to *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80, referring to an order striking out an answer said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus standi in that form. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.' The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be

heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be ⁴⁷⁰ omitted altogether. It would be like saying to a party, 'Appear, and you shall be heard'; and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.' In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

"The law is and always has been, that wherever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him." In *Underwood v. McVeigh*, 23 Gratt. 409, of a decree given after an answer was stricken out, the court said: "It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegation of fact, and upon the matter of law; and no sentence of the court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without the opportunity of defense. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary to the proper administration of justice by all nations, and in every stage of

social existence." In the four cases just cited the decrees were held void as not judicial sentences. The party had no day in court. It is not due process of law under state and federal constitutions. It is condemnation without notice. The party's case has been put out of court. No matter the character of his defense, no matter that he be in contempt, lasting final decree against him, involving in this case his most important rights in life, cannot be entered. It is void for want of due process. It violates that definition of due process of law given by Daniel Webster approved without dissent everywhere. "By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." Such action denies equal protection of the law. The law imposes ⁴⁷¹ no such heavy penalty for contempt. The right of defense is given to one man and denied to another for no cause involved in the merits. If there is any plain right as to judicial procedure, I assert that it is a right to defend where attacked in person, character or property. We recognize in both opinions in *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676, 49 W. Va. 733, that whilst a court might refuse affirmative action, in favor of one in contempt, it could not deny one attacked the right to defend. This distinction between plaintiff and defendant will be found in the opinion in *Hovey v. Elliot*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215. To support the particular position that a defense cannot be denied to one failing to pay temporary alimony because in contempt, I cite *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122, holding that an answer cannot be stricken out, but the contempt may be punished otherwise; *Gordon v. Gordon*, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. 446, 21 L. R. A. 387; *Johnson v. Superior Court*, 63 Cal. 578, holding that one in such contempt cannot be denied process for witnesses; *Bailey v. Bailey*, 69 Iowa, 77, 28 N. W. 443, holding that it would be against public policy to deny a defense for such contempt; *Cason v. Cason*, 15 Ga. 405; *McMakin v. McMakin*, 68 Mo. App. 57, holding that contempt "does not authorize the striking of answer or refusal to admit evidence for him"; *Allen v. Allen*, 72 Iowa, 502, 34 N. W. 303, where the court said: "It will not do to hold that the marriage relation may be dissolved on the ground of defendant's inability to pay

a sum for alimony, or because of his recusancy"; Dwelly v. Dwelly, 46 Me. 377; Newhouse v. Newhouse, 14 Or. 290, 12 Pac. 422. Century Digest, volume 17, section 738, will show few cases to sustain such action. Outside New York scarcely any. Its leading case, Walker v. Walker, 82 N. Y. 260. seems hesitating, and rests on the old arbitrary practice of English chancery. But it is not sound English law as the supreme court holds in Hovey v. Elliot, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, and as shown in Gordon v. Gordon, 141 Ill. 163, 33 Am. St. Rep. 294, 30 N. E. 446, 21 L. R. A. 387, citing Haldine v. Eckford, L. R. 7 Eq. 425, where the English court said: "Though the contempt of the defendants had been of the most flagrant kind, yet as what they asked was for the purpose of defending themselves, he had no jurisdiction to refuse the order." Other English cases are there cited. The Illinois court says the New York case is not looked upon with favor or followed. Some cases cited to the reverse do not support that reverse. Casteel v. Casteel, 38 Ark. 477, holds that the plaintiff's suit may be dismissed for refusal to pay wife's counsel fees. Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633, did not refuse defense, but refused to hear the case on the contemnor's motion, refused a favor asked by him. Waters v. Waters, 49 Mo. 385, only holds that a plaintiff's suit may be dismissed for failure to pay a wife money to carry on her defense. Clark v. Clark, 117 N. Y. 622, 22 N. E. 1127, does not touch the matter.

Another consideration not without force is that we have a statute prescribing how contempts shall be punished. It was passed in 1830 to restrain arbitrary action by courts: Code of 1899, c. 147. I think it contemplates only fine and imprisonment. It curbs or lessens the common-law power of courts: State v. Hansford, 43 W. Va. 773, 28 S. E. 791. Just as it was held to be the sole mode of punishment in Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167.

But it is argued in answer to the point just discussed, that the striking out of the evidence is immaterial, as if all the evidence be considered the same decree would have been made. How do we know what the circuit court would have thought? The evidence was voluminous and flatly contradictory in material respects—contradictory as to the criminal conduct and as to desertion and other matters. Now,

first, a decree without a hearing of both sides is not judicial decision. The case has never been passed on by the circuit court. The party had right to have the judgment of the circuit court on his evidence and cause before this court can consider the weight of the evidence. Had the decree on evidence on both sides been for the defendant, we could not reverse, unless this court would think it clearly wrong, because he would have the advantage of that decision, and occupy a different position from that which he now occupies. We cannot, in the first instance, be asked to pass on the evidence. This is an appeal court, and is not called on to act until the circuit court has done so. There must be a hearing of the whole case. There has not been. "The supreme court will not consider questions not yet acted on by the circuit court": *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289; *Armstrong v. Town of Grafton*, 23 W. Va. 50. This case, as made up on both sides, has never been decided by the circuit court. But second, the decree is void under the high authorities above given. Can it be, with reason, ⁴⁷³ said that where the whole of a defendant's case has been struck out, consisting of a volume of material evidence, that this court should perform the function of a court of original jurisdiction, treat the case as if heard on the whole evidence in the court below and review it on the evidence on both sides? When it is just as though the party was not before the court, and was decreed against "without a day in court." Shall we not rather say the case has not been heard—the decree is not binding on the defendant, and remand the case that it may be heard on the evidence. On that evidence we indicate no opinion.

Considerable evidence of admissions in the country by the defendant of criminal conduct was given, which is assailed as incompetent. Can these admissions be considered? As it is deemed by law in the interest of society that marriage should not be dissolved on insufficient grounds, and cannot be dissolved by consent of parties, the common law held such admissions not effectual to sustain a ground for divorce, certainly not alone: 30 Am. Dec. 544; *Bishop on Marriage, Divorce and Separation*, secs. 707, 730. The lowest grade of evidence in weight: *Nelson on Divorce*, sec. 781. "While not alone sufficient to warrant a decree, it is admissible in connection with other evidence, unless a statute forbids": 14

Cyc. 682. Does our statute law, Code of 1899, chapter 64, section 8, ban such evidence wholly? We think so. The legislature intended to render it incompetent. "Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise." Now, this prohibits the bill from being taken for true on default of the defendant to appear, thus making it different from other suits, and in accordance with the rule in divorce cases requires proof of the grounds of divorce. Next, it forbids a decree though the wrongful act be admitted solemnly in the answer. It must be proven. Now, if an admission or confession in an answer is of no avail, why shall we say that one made in the country is? Can a decree be had thus by indirection when it cannot by an answer of confession? Plain intent and policy would thus be violated. The letter of the law is that the case shall be decided "independently ⁴⁷⁴ of the admissions of either party in the pleadings or otherwise." What does this broad word "otherwise" mean? We must give it some effect, as it is sedately added. After saying default, silence shall not avail, but proof must be made; after saying, with special reference to admissions in the answer, that they shall count nothing, this word is added to say that no admission in the country, outside the pleading, shall count. One case in Virginia on this statute seems to hold otherwise: *Bailey v. Bailey*, 21 Gratt. 43. I have never been able to see with certainty what it means. Does it mean to say that admissions in letters only are competent? *Cralle v. Cralle*, 79 Va. 182, only goes to the effect that admissions may be used to defeat a divorce. *Latham v. Latham*, 30 Gratt. 307, only says that defendant is entitled to a denial in his answer—that the act never designed to eliminate that pleading so far as to refuse the benefit of its denial. *Hampton v. Hampton*, 87 Va. 148, 12 S. E. 340, overrules *Bailey v. Bailey*, 21 Gratt. 43, by holding under the statute that "evidence that the defendant admitted the charge (of adultery) and a letter from her purporting to admit it, are inadmissible." If this is not the purpose of this plain statute, what is it? Sometimes it operates to defeat justice; but it has a policy which the law has always held as to the marriage state. If wrong, the remedy is with the legislature. Under another

construction a party may obtain a divorce by his or her admission, or greatly aid by it in doing so. It would open the door to collusion between the parties; it would enable one party more easily to divorce himself.

The decree of the eighth day of December, 1903, is reversed and the case remanded for further proceedings.

POWER OF COURTS TO STRIKE OUT ANSWERS SUFFICIENT IN FORM AND SUBSTANCE TO PRESENT VALID DEFENSES.

I. In General—Due Process of Law, 950.

II. In Case of Person in Position of Alien Enemy, 950.

III. In Case of Person in Contempt of Court.

a. In General, 952.

b. In Divorce Suits, 954.

I. In General—Due Process of Law.

The authority of a court, if such exists, to strike out answers sufficient in form and in substance, raises the question of what constitutes due process of law. Due process of law means a course of legal proceeding according to rules and principles under an established system of jurisprudence for the protection and enforcement of private rights, requiring a court of competent jurisdiction to pass upon the subject matter of the proceedings and a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated: *Carr v. Brown*, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9, 38 L. R. A. 294. It means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property: *Rouse v. Donovan*, 104 Mich. 234, 53 Am. St. Rep. 457, 62 N. W. 359, 27 L. R. A. 577. It requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, prior to judgment, is absolutely essential: *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206.

II. In Case of Person in Position of Alien Enemy.

The constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law was, in several decisions rendered in the years following the war of the Rebellion, found applicable to persons serving in the Confederate army. It was therefore held that when proceedings were instituted against them in the federal courts for the forfeiture of their property under the act of Congress providing therefor, they were entitled to appear

in person or by attorney, answer to the charges, and make a defense: *Buford v. Speed*, 74 Ky. (11 Bush) 338; *McVeigh v. United States*, 11 Wall. 259, 20 L. ed. 80. In the Kentucky case, the appellant, who was in Confederate army, was regarded as an alien enemy; and in the United States case it was urged that the respondent was an alien enemy, as a ground for striking his answer in the district court from the files. Said Justice Swayne: "It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice."

The authority of a court to condemn the estate of a Confederate without giving him an opportunity to be heard and to defend was again denied by the supreme court of the United States in *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914, where Justice Field, referring to the above words of Justice Swayne, said: "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to any respect in any tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment. . . . But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether. It would be like saying to a party: 'Appear, and you shall be heard'; and, when he has appeared, saying: 'Your appearance shall not be recognized, and you shall not be heard.' In the present case the district court not only in effect said this, but immediately added a decree of condemnation reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

III. In Case of Persons in Contempt of Court.

a. **In General.**—For contempts committed in its presence a court may impose punishment summarily. In such cases the punishment usually immediately follows the commission of the offense, without the necessity of any preliminary process, evidence, or hearing, for the acts constituting the contempt having been committed in the presence of the court, they are actually and judicially known to it without any inquiry or investigation. This is only the exercise of a power necessarily inherent in every judicial tribunal in order to the administration of justice, the preservation of the dignity of the court, and the enforcement of decorum and good order. Summary proceedings in cases of this kind have been pursued by courts from time out of mind, and doubtless constitute due process of law. But if a contempt has not been committed in the presence of the court, or within its view, then the person accused of the offense is entitled, before being punished therefor, to notice of the matters charged against him and of the time and place of hearing the same. He cannot be condemned before he is heard or given an opportunity to be heard. The reason for the distinction between two classes of cases is obvious. In the first case the court sees and knows of the acts which constitute the contempt, and needs no testimony to establish their existence as facts. While in the second case testimony must be given to inform the court; and, this being so, due process of law demands that the testimony be heard publicly, in open court, and by both sides to the controversy, after due notice to the accused of what is alleged against him, so that he may have an opportunity to meet and explain it: *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567; *Palmer v. Palmer*, 28 Fla. 295, 9 South. 657; *State v. District Court*, 124 Iowa, 187, 99 N. W. 712; *In re Noonan*, 47 Kan. 771, 28 Pac. 1104; *Wheeler etc. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; *State v. Anders*, 64 Kan. 742, 68 Pac. 668; *State v. Ives*, 60 Minn. 478, 62 N. W. 831; *State v. Willis*, 61 Minn. 120, 63 N. W. 169; *Holt's Case*, 55 N. J. L. 384, 27 Atl. 909; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402; *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405; *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. Rep. 699, 33 L. ed. 150; *Ex parte Stricker*, 109 Fed. 145.

The contention has been made, and successfully in some courts, that a court has the power to refuse a party in contempt the right to defend in the principal case on its merits. The weight of authority is to the effect, however, that a party cannot be deprived of an opportunity to appear, defend, and appeal from any proceeding against him because he is in contempt therein: *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485; *People v. Horton*, 46 Ill. App. 434; *Glover*

v. American etc. Ins. Co., 130 Mo. 173, 32 S. W. 302; Hebb v. Tucker County Court, 48 W. Va. 279, 37 S. E. 676; Haldane v. Eckford, L. R. 7 Eq. 425. The denial of the right of the party to defend because in contempt has generally been exercised, or attempted to be exercised, by striking his demurrer or answer from the files.

The leading case on this question, wherein are reviewed the earlier American and English decisions, is *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215. The question there presented and answered was, to quote from the opinion: "Whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without a consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. . . . It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." And speaking of the assertion that courts of chancery in England have possessed and exercised such power from the earliest times, the court furthermore said: "Certain it is that in all the reported decisions of the chancery courts of England no single case can be found where a court of chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And the American adjudications, whilst there are two cases, one in New York and the other in Arkansas, asserting the existence of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous character of the conclusions reached."

The provision in section 1991 of the California Code of Civil Procedure, authorizing a court to strike out the answer of a defendant who fails to attend when required to give his deposition, has been declared unconstitutional, as tending unduly to restrict the right to defend an action: *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889.

b. **In Divorce Suits.**—The authority of a court to strike from the files the pleadings of a defendant on the ground that he is in contempt in disobeying the orders of the court in the pending actions, has been contended for most frequently, perhaps, in suits for divorce. There seems to be no doubt that where a husband institutes an action for a divorce, and the court makes an order directing him to pay temporary alimony and suit money to enable the defendant to make her defense, his neglect or refusal to obey the order will warrant the court in refusing to proceed further with the case until the payment is made as directed: *Mangels v. Mangels*, 6 Mo. App. 481; *State v. St. Louis Court*, 99 Mo. 216, 12 S. W. 661; *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422; *Scott v. Scott*, 9 S. Dak. 125, 68 N. W. 194; *Wright v. Wright*, 6 Tex. 29.

Some courts have intimated, and some have actually held, that where a wife brings an action for a divorce, and the defendant declines or neglects to obey an order of the court to pay temporary alimony and counsel fees to enable her to prosecute her suit, the court has authority, at least in extreme cases, to strike out his answer, and proceed with the action as though no answer had been filed: *Casteel v. Casteel*, 38 Ark. 477; *Peel v. Peel*, 50 Iowa, 521; *McClung v. McClung*, 40 Mich. 493; *Walker v. Walker*, 82 N. Y. 260; *Quigley v. Quigley*, 45 Hun, 23; *Brisbane v. Brisbane*, 67 How. Pr. 184; *Knott v. Knott*, 6 App. Div. 589, 39 N. Y. Supp. 804. This rule has been applied where the defendant, refusing to comply with the order to pay alimony, has absented himself from the state, so that he cannot otherwise be punished, except by striking out his answer: *Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 665; *Bennett v. Bennett*, 15 Okla. 286, 81 Pac. 632, 70 L. R. A. 864.

A majority of the authorities, however, maintain that, as a rule, a court has no power, when the defendant in a divorce action is in contempt in disobeying an order to pay alimony, to strike out his answer, or otherwise prevent him from interposing a defense on the merits; for such a course not only deprives the defendant of his day in court, but it ignores the public interest in the preservation of the marriage relation: See the principal case, *ante*, p. 940; *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *Cason v. Cason*, 15 Ga. 405; *Gordon v. Gordon*, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. 446, 21 L. R. A. 387; *Eastes v. Eastes*, 79 Ind. 363; *Bailey v. Bailey*, 69 Iowa, 77, 28 N. W. 443; *Allen v. Allen*, 72 Iowa, 502, 34 N. W. 303; *Dwelly v. Dwelly*, 46 Me. 377; *McMakin v. McMakin*, 68 Mo. App. 57; *Larson v. Larson*, 9 S. Dak. 1, 67 N. W. 842; *Bachelor v. Bachelor*, 30 Wash. 639, 71 Pac. 193; *Ward v. Ward*, 70 Vt. 430, 41 Atl. 435.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

JACKMAN v. EAU CLAIRE NATIONAL BANK.

[125 Wis. 465, 104 N. W. 98.]

BANKRUPTCY—Conversion of Mortgaged Property—Demand. In an action to recover mortgaged property transferred in fraud of the bankruptcy act, when such property has been converted before the commencement of the action and its proceeds applied to the mortgage indebtedness due the defendant, no demand for its return is necessary. (p. 957.)

BANKRUPTCY—Recovery of Unlawful Preferences—Filing of Claims.—If a trustee brings an action to recover unlawful preferences made by the bankrupt in fraud of the bankruptcy act, it is not necessary for him to allege in his complaint that any creditor has filed a claim in the bankruptcy proceeding, or any fact showing that it was necessary to recover the alleged preference. (p. 957.)

BANKRUPTCY—Illegal Preferences.—In an action by a trustee in bankruptcy to recover the proceeds of property alleged to have been transferred in fraud of the bankruptcy act, the question as to whether there was one or more classes of creditors, and in what manner the property sought to be recovered would be administered, does not vary the legal rights of the trustee to recover the property. (p. 960.)

BANKRUPTCY—Jurisdiction of State Courts.—State courts have jurisdiction to litigate questions arising between a trustee in bankruptcy and any adverse claimant concerning transfers of property claimed to have been made in fraud of the national bankruptcy act. (p. 961.)

BANKRUPTCY—Unlawful Preferences—Conversion—Trove. If a transfer of property in fraud of the national bankruptcy act consists in carving out an interest in the property and transferring it by means of a chattel mortgage, and the bankrupt then sells the mortgaged property to a third person subject to the mortgage, such third person then valuing the mortgage interest and delivering it to the mortgagee in notes which are subsequently paid, such notes are not property obtained by the mortgagee, but instruments by means of which the mortgage interest is transferred to him in the form of money, and such transactions constitute a wrongful conversion of the property to the extent of such mortgage interest for the recovery of the proceeds of which trover will lie at the suit of the trustee in bankruptcy. (pp. 963, 964.)

BANKRUPTCY—Unlawful Preference—Notice of Insolvency.

If a chattel mortgage is claimed to have been given to create a preference in fraud of the provisions of the national bankruptcy act, the question of the knowledge of the mortgagee of the mortgagor's insolvency at the time of the execution of the mortgage is one of fact, and such mortgagee is chargeable with notice of all facts which a reasonable inquiry in view of the circumstances with respect to the mortgagor's financial condition, or which were brought home to him, might fairly be expected to disclose. (p. 965.)

BANKRUPTCY—Unlawful Preferences—Notice of Insolvency.

If a creditor receives security for the payment of his claim, with knowledge, or reasonable means of knowledge, of the insolvency of the debtor at the time, and that is followed within four months by the commencement of proceedings in bankruptcy against or on the part of the debtor, the intention of such security being to give the favored creditor a preference, and yet have the same standing as other creditors for the balance of his claim, as he would have if the transaction were valid, the effect thereof is to give such creditor an undue advantage and preference within the meaning of the national bankrupt act. (p. 965.)

BANKRUPTCY—Conflicting Actions.

If a trustee in bankruptcy brings an action to recover from a guilty agent the value of property wrongfully converted by the debtor, this is not a bar to an action by such trustee to recover the value of the same property from the guilty principal, when both actions are commenced on the theory that such property was converted in fraud of the bankruptcy act. (p. 966.)

BANKRUPTCY—Unlawful Preferences—Recovery.

A trustee in bankruptcy acting for creditors in an action to recover unlawful preferences made by the debtor is not entitled to recover money paid him by mistake, and by him paid over to the person holding such preferences, when such money is no part of the bankrupt's assets. (p. 968.)

BANKRUPTCY—Unlawful Preferences—Lien Claims.

In an action brought by a trustee in bankruptcy to recover the value of property of the debtor wrongfully converted in fraud of the bankruptcy act, he is not entitled to recover money realized by the person holding such property in the enforcement of lien claims thereon. Such money is a mere realization by such person of his interests in the property paramount to the rights of the trustee, and not in violation of the bankrupt act governing unlawful preferences. (p. 968.)

Action by a trustee in bankruptcy to recover the value of property transferred by chattel mortgage, as a preference in violation of the national bankrupt act. The facts fully appear from the opinion of Mr. Justice McKenna, delivered by the supreme court of the United States in affirming the principal case and hereafter appended.

Bundy & Wilcox, for the plaintiff.

Wickman & Farr, for the defendant.

⁴⁷⁵ KERWIN, J. On defendant's appeal several errors are assigned, which, so far as deemed necessary, will be considered in their order.

1. It is claimed that the court erred in overruling defendant's demurrer to plaintiff's complaint, because no demand was alleged, and, further, that the complaint does not sufficiently allege the necessity of bringing the action. Had the property covered by the chattel mortgages been in the possession of or under the control of defendant at the time action was brought by the trustee, so that it could have been surrendered upon demand, it would be necessary to consider and decide this question. There is very respectable authority to the effect that no demand is necessary before action by a trustee to recover property transferred in fraud of the bankrupt act, upon the theory that, the whole transaction resulting in a preference being unlawful, no demand is necessary: *Goldberg v. Harlan*, 33 Ind. App. 465, 67 N. E. 707; *Loveland on Bankruptcy*, 609; *Bull v. Houghton*, 65 Cal. 422, 4 Pac. 529. But in the case before us it appears from the allegations of the complaint that the mortgaged property had been converted before the commencement of the action and the proceeds applied upon the mortgaged indebtedness of the defendant. The defendant, by such conversion, put it out of its power to restore the property, and under such circumstances no demand was necessary: *Dunham v. Converse*, 28 Wis. 306; *Crampton v. Valido M. Co.*, 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120; *Shuman v. Fleckenstein*, 4 Saw. 174, No. 12,826.

Counsel for defendant further claims that the complaint is defective in not alleging that any creditor had filed a claim in the bankruptcy proceeding, or any fact showing that it was necessary to recover the alleged preference, and *Mueller v. ⁴⁷⁶Bruss*, 112 Wis. 406, 88 N. W. 229, is cited in support of this contention. It is sufficient answer to this proposition to say that such case deals only with the provision of the bankrupt act concerning the capacity of the trustee to avoid transfers of property in fraud of creditors, which, in the absence of the bankruptcy proceedings, such creditors might themselves avoid. This action deals with an entirely different matter, under that part of the bankruptcy act relating to unlawful preferences, where it is provided that: "If a bankrupt shall have given a preference within four months before the filing of a petition and before the adjudication, and the

person receiving it, or to be benefited thereby, or his agent; acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person": Bank. Act July 1, 1898, c. 541, subd. b, sec. 60, 30 Stats. at Large, 562 (U. S. Comp. Stats. 1901, p. 3445).

No condition precedent to the right of the trustee to recover such property is found in the statute, as will be seen, and obviously courts cannot legitimately ingraft any upon it.

2. Concerning the second assignment of error but little need be said. The president of defendant was called for examination as an adverse party by plaintiff. Objection was made by plaintiff to defendant's right to cross-examine this witness, as he was called by plaintiff for cross-examination as an adverse party, and the objection sustained. We fail to see how defendant was prejudiced by this ruling. It could have called and examined the witness, and he, being president of the bank, doubtless was not an unwilling or hostile witness. Therefore no reversible error was committed by the ruling.

3. Error is assigned upon the alleged ambiguity in and insufficiency of questions 4 and 5 of the special verdict, which deal with the subject as to whether the Waters-Clark Lumber Company, in acquiring title to the property in question, acted for the bank with the understanding that a portion of the proceeds ⁴⁷⁷ of such property would be accounted for to defendant. Much that is said by counsel for plaintiff on this branch of the case is quite immaterial in view of the conclusion we have reached that the legal wrong for which defendant is liable goes back to the time the chattel mortgage was executed, and goes no further than the interest in the logs and lumber which in the form of money finally came to its possession. The only direct interest, as it appears from the uncontroverted evidence, was represented by the chattel mortgages, certain lien claims acquired by purchase, and a small amount additional that will be referred to specifically hereafter, and which was, as appears, substantially charged to it in the accounting by which the total interest in the property for which defendant was liable was arrived at. We can hardly agree with the treatment by the learned circuit judge in his opinion of the verdict as to the questions under discussion. He expressed the view that such questions and the answers thereto do not find that the lumber company acted as agent for defendant in

taking the title to the lumber. We find in the learned judge's opinion: "It is not found that the lumber company was the agent of the defendant. If that were so, then it would result that the defendant really received the property. The jury has found that the lumber company took title pursuant to an agreement between Young and the bank by which the lumber company was to account to the bank for a portion of the proceeds. The bank received the notes, and not the logs and lumber."

This part of the opinion of the learned circuit judge can hardly be reconciled with the language to which it refers, since it in effect sets the verdict aside as to the two questions and substitutes in place thereof, as a fact shown to exist by the undisputed evidence, that the lumber company, without any other relation to the bank than an understanding with it that its interest in the logs and lumber should be recognized and satisfied out of the proceeds of such property, purchased ⁴⁷⁸ the same. When the jury decided that the lumber company took title to the property acting for the defendant and for its benefit, they pretty clearly decided that the latter was a principal and the former a mere agent in the matter. However, the evidence seems to clearly establish that the lumber company purchased the property from Young in the regular course of business, without any understanding with the defendant other than that its interest in the property as mortgagee and claimant under numerous statutory labor liens should be recognized and the equivalent thereof in money delivered to it out of the proceeds. It were better if the court had entirely omitted the two questions criticised, because the matters covered by them were not in controversy on the evidence, and had framed one appropriate to the case and directed the proper answer, or left the matter to the jury, or found the facts independently. Having taken the answers and come to the conclusion indicated by that part of the opinion quoted, the better way certainly would have been to set the answers aside, rather than to bend the questions into a form which would harmonize with the supposed truth of the matter. We may say in passing that the idea which the court voiced in the opinion that defendant did not receive any logs or lumber, but received notes, so far as it suggests that defendant did not receive the property, or any of it, for which the recovery was sought, is hardly consistent with the rendition of the judgment which followed, since the very purpose of the action

was to recover the value of property, logs and lumber, not notes, wrongfully converted by defendant to its own use. If the reasoning of the learned court were sound, the suggestion made by counsel for the defendant that the action was brought on one theory and went to judgment on another would not be wholly without merit. The fact is, as it seems, that the defendant did in legal effect receive into its possession and convert to its use the property in question to the extent of the chattel mortgage interest. The foregoing ⁴⁷⁹ renders it unnecessary to discuss further questions 4 and 5, or to consider complaints made as to instructions given in respect thereto.

4. Error is assigned on the instruction to the effect that all the creditors belonged to one class. Whether that is right or wrong does not seem to in any way concern the case. This action, as we have indicated, is simply one in trover to recover the value of property which, as is alleged, was in fraud of the bankrupt act, wrongfully converted by defendant to its own use. Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. If the property was obtained by the defendant in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved.

5. Error is assigned because of the refusal to direct a verdict for defendant and in denying defendant's motion to correct the special verdict and for judgment in favor of defendant. A vigorous argument is made by counsel for defendant against the right of the trustee to maintain this action in the state court, relying mainly upon two Wisconsin cases: *Brigham v. Claffin*, 31 Wis. 607, 11 Am. Rep. 623; *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. Rep. 685. These cases were decided under the bankrupt act of 1867, which was quite different from the law under which the present case was brought; and it appears that one of the reasons given for denying the right of the state court to take jurisdiction was that the federal courts had exclusive jurisdiction in such cases, and that conflicts of interest might arise. Under the bankrupt act of 1898 the supreme court of the United States, in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000, 44 L. ed. 1175, held that the United States courts had no jurisdiction over suits similar to the one before us unless by consent of the proposed defendant; and that in the absence

of express prohibition the state courts lose none of their jurisdiction ⁴⁸⁰ to litigate questions arising between the trustee in bankruptcy and any adverse claimant concerning transfers of property claimed to be made in fraud of the bankrupt act. That even jurisdiction conferred upon the United States courts does not divest the state courts of jurisdiction in such cases: *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000, 44 L. ed. 1175. Under the above decision at the time this action was commenced the United States courts had no jurisdiction of the action, and unless it could be brought in the state court the plaintiff was without a remedy and the provisions of the bankrupt act practically nullified. It is therefore very clear that by the bankrupt act of 1898 the general jurisdiction of the state courts in independent actions between the trustee and adverse claimants was in no manner abridged, and this doctrine is recognized in subdivision b, section 23, Bankruptcy Act of 1898 (30 Stats. at Large, 552 [U. S. Comp. Stats. 1901, p. 3431]), which provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." This subdivision was amended in 1903 (Act Feb. 5, 1903, c. 487, sec. 8, 32 Stats. at Large, 798 [U. S. Comp. Stats. Supp. 1903, p. 413]) by adding: "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e." So when this suit was brought it could not be maintained in the federal court without the consent of the defendant: *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000, 44 L. ed. 1175; *Perkins v. McCauley*, 98 Fed. 286. The bankrupt act of 1898 neither expressly nor by necessary implication having excluded the state court or given exclusive jurisdiction to the federal courts in suits by trustees to recover property transferred in fraud of the bankrupt act, the ordinary jurisdiction of the state court under the constitution and laws continued to exist: *French v. R. P. Smith & Sons*, 81 Minn. 341, 84 N. W. ⁴⁸¹ 44; *Chism v. Citizens' Bank*, 77 Miss. 599, 27 South. 637; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000, 44 L. ed. 1175. And this doctrine is in harmony with the general theory in favor of concurrent jurisdiction under the constitution and laws. No reason exists why a contestant with a bankrupt

in such case should lose any of his rights by the bankruptcy of his adversary, and for obvious reasons it might be preferable for him to litigate in the state courts. Hence the provision of subdivision b, section 23, of the Bankruptcy Act of 1898, to the effect that suits by a trustee shall only be brought in the courts where the bankrupt might have brought and prosecuted them if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendant: *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833. It is well settled that, unless exclusive jurisdiction be given to the federal court, state courts have concurrent jurisdiction, subject to review by the supreme court of the United States, except in cases where by the constitution itself the power is given exclusively to the federal courts or prohibited to the state courts: *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833. It is clear, therefore, as a general proposition, that at the time this action was commenced state courts had jurisdiction of such controversies. But it is claimed on the part of the defendant that the action cannot be maintained without overruling *Brigham v. Clafin*, 31 Wis. 607, 11 Am. Rep. 623, and *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. Rep. 685. It will be observed, however, that these cases were decided under the bankrupt act of 1867, and it was held under this act that the federal and state courts had concurrent jurisdiction, and hence the bankruptcy statute was not nullified by refusal on the part of the state courts to take jurisdiction. Besides, these Wisconsin decisions were put upon the ground that the action being penal, and arising under the federal statute providing a federal forum for redress, state courts should not interfere to enforce a penalty under a federal statute. And further, that conflicts might arise between the state ⁴⁸² and federal courts, and this being so, and the statute a penal one, and the United States courts having jurisdiction, grave consequences were anticipated in the assumption of jurisdiction by the state courts. In *Brigham v. Clafin*, 31 Wis. 607, 11 Am. Rep. 623, at page 613, this court says: "In the first place, it must be obvious that the assertion of a state jurisdiction in such causes will greatly tend to protract and multiply suits in respect to the bankrupt's estate, and will inevitably be a most fruitful source of conflict and collision between

the state and federal tribunals. The object and policy of the bankrupt law manifestly are to collect and distribute the property of the bankrupt among his creditors as promptly as practicable; and these ends can be much more readily accomplished by the United States courts—which have plenary jurisdiction in these matters—than by tribunals acting by different modes, and deriving their powers from other sources.”

No such consequences could result from the bankrupt act of 1898. On the contrary, the contention of counsel for defendant would put the trustee in the anomalous position of being unable to administer his trust because no court was open to him. The bankrupt act of 1898 clearly contemplates that suits similar to the one before us may be brought in state courts, and cannot in the United States courts. This court has declined to follow the doctrine of *Brigham v. Clafin*, 31 Wis. 607, 11 Am. Rep. 623, and has, in effect, held that actions like the instant case may be maintained in the state courts: *Binder v. McDonald*, 106 Wis. 332, 82 N. W. 156; *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229. State courts, therefore, should take jurisdiction, and the action was properly brought: *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. Rep. 1000, 44 L. ed. 1175; *Lyon v. Clark*, 124 Mich. 100, 82 N. W. 1058, 83 N. W. 694; *French v. R. P. Smith & Sons Co.*, 81 Minn. 341, 84 N. W. 44; *Perkins v. McCauley*, 98 Fed. 286; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123; *Whitman v. Oxford* ⁴⁸³ Nat. Bank, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587; *Chism v. Citizens' Bank*, 77 Miss. 599, 27 South. 637.

It is further claimed by counsel for defendant that the property for the value of which this suit was brought had never been sold or received by the defendant, and therefore the action cannot be maintained; that the defendant received notes, not property. It was established on the trial, without any room for reasonable controversy, that what the bank got was its mortgage interest, obtained in fraud of the bankrupt act, and its interest by reason of certain lien claims, and a small amount in addition, as we have before indicated. The notes were but mere instruments by means of which its interest in the property was transferred to its possession in the form of money. To all intents and purposes it received the

logs and lumber to the extent of its interests therein as effectually as any chattel mortgagee obtains his interest in the subject covered thereby when a purchaser thereof subject to the mortgage values the mortgage interest and delivers it to the mortgagee in money. The act of carving out an interest in the property and transferring it by means of the mortgage, and the enforcement thereof in fraud of the bankrupt act, was, to all intents and purposes, a wrongful conversion of the property to that extent. The complaint was in trover, which was proper under the circumstances. The difficulty at several points in this case is in the fact before mentioned, that the mere instrument by means of which an interest in the property was transferred to defendant has been treated as the property defendant obtained.

It is further claimed by defendant that there is no evidence sufficient to support the finding that defendant had reasonable cause to believe that Young intended by the sale to enable the bank to obtain a greater percentage of its debt than other creditors of the same class would be able to obtain, and we are earnestly asked by counsel to carefully consider the evidence upon this subject. Quite a lengthy argument is ⁴⁸⁴ made by counsel to the effect that the enforcement of the mortgage indebtedness would not enable defendant to obtain a greater percentage of its debt than any other creditor of the same class; hence there was no preference. There is abundance of evidence to the effect that Young was insolvent at the time of execution of the mortgages, and that the agents of defendant, when the mortgages were executed, has reasonable cause to believe that Young intended to give defendant a preference. It would serve no useful purpose to go into a lengthy discussion of the evidence upon this proposition. Young was hopelessly insolvent when the mortgages were executed. He in effect told the officers of the bank, when requested to make the mortgages, that he did not have sufficient property to pay all his creditors. He did all his banking business with defendant. He was not a man of large means or large business interests. Defendant had examined into his affairs, and knew, or ought to have known, his financial condition. His indebtedness to the bank during a period of about two years prior to the execution of the mortgages had increased from \$2,000 to \$27,000, while during the same time there is evidence to the effect that his assets decreased.

The officers of the bank were urging payment for a year before the mortgages were given, claiming the loan was too large. It appears that a day or so after Young's mill burned an officer of the bank requested him to execute chattel mortgages, and presented them to him prepared; that he refused, saying it would not be fair to do that and leave all the rest of his creditors, as he did not have enough to pay all he owed; and the officer of defendant said he ought not to go back on the bank, that it had used him well, and he ought to give it a mortgage. At this time he refused to execute the mortgages, but did about a week later. Young testified that he intended to give defendant a preference. It is true he made statements to the bank showing his assets much larger than they really were, but, in view of the large indebtedness ⁴⁸⁵ to the bank and its familiarity with his business, together with the fact that he was meeting practically all his obligations with fresh promises to pay, and constantly increasing his indebtedness, the defendant must be charged with knowledge of his insolvency at the time of the execution of the mortgages. But it is useless to pursue the investigation. It is sufficient to say that we are convinced from a careful examination of the evidence that it supports the verdict, and upon well-established principles such finding cannot be disturbed. Whether defendant had reasonable cause to believe that Young was insolvent within the meaning of the bankrupt act was a question of fact, and it was chargeable with notice of such fact as reasonable inquiry in view of the circumstances with respect to the debtor's condition, which were brought home to it, might fairly be expected to disclose. So the facts and circumstances in this case were sufficient to warrant the jury in finding that the mortgages were executed with intent of giving defendant a preference: *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *Giddings v. Dodd*, 1 Dill. 116.

It is claimed, however, by counsel for defendant that, unless the enforcement of the mortgages would operate to give defendant a greater percentage of its debt than other creditors of the same class would receive, the mortgages did not amount to a conveyance of property—or, in other words, a preference—within the meaning of the bankrupt act. We do not so understand the law. The federal statute renders void

any preference given under the circumstances specified therein, and, as we have seen, gives the trustee in bankruptcy the right to recover any property, or its value, conveyed in violation of such act. Manifestly, if a creditor receives security for the payment of his claim, and that is followed within four months by the commencement of proceedings in bankruptcy against or on the part of the debtor, the intention of ⁴⁸⁶ such security being to give the favored creditor a preference (he having knowledge or reasonable means of knowledge thereof), and yet have the same standing as other creditors for the balance of his claim, as he would have if the transaction were valid, the effect would necessarily be to give such creditor an undue advantage—a preference, within the meaning of the bankrupt act. That is too clear to admit of reasonable controversy: *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481.

The further point is made that prior to the commencement of this action plaintiff ratified the sale by Young to the Waters-Clark Lumber Company, which, by this action, it is sought to avoid, in that July 7, 1902, he began an action against such company on the theory that there was such a sale; that the property was of the value of \$35,000; that the company agreed to pay certain liens on the property, and that, after taking account thereof, there was a balance due Young; that the action was grounded on implied contract, and precluded subsequent action sounding in tort to recover the subject of the sale. True, one cannot pursue inconsistent remedies to obtain redress for a single wrong. He cannot bring replevin or trover upon the theory that the property involved is his, and subsequently sue upon contract as if the title to the property had passed from him or beyond his reach: *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698, 53 L. R. A. 603; *Smeesters v. Schroeder*, 123 Wis. 116, 101 N. W. 363; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1. But we fail to see how this doctrine applies here. Counsel for defendant seems to have misconceived the character of the action commenced by the plaintiff against the Waters-Clark Lumber Company. As we read the complaint, a copy of which is found in the record, the cause of action set forth therein is similar to the one here. It is in trover to recover the value of property wrongfully converted. The lumber company is there charged with having, as agent for the defendant here, in fraud of the bankrupt law, obtained

possession of the property ⁴⁸⁷ in question by purchasing the same of Young. This action charges the same thing. While before the effort was to recover the value of the property of a guilty agent, here the purpose was to recover the value of the property of the guilty principal. Both actions were commenced upon the theory that the property in question was, in fraud of the bankrupt law, converted by the lumber company and the defendant, the former acting as agent of the latter.

6. It is further assigned as error that the judgment is excessive. The court fixed the amount by taking the aggregate of the two notes and the \$700 paid for nonlien time checks held by the bank, aggregating \$6,660.99, and deducting therefrom \$406, amount of nonlien time checks taken by defendant between February 20th and March 29th, leaving the balance of \$6,254.99, for which amount, with interest and costs, judgment was rendered. Counsel for defendant concedes that the \$406 should not have been deducted, but contends that, because there was included, in one of the notes making up the aggregate of \$6,660.99, \$413 overpayment on the purchase price of the logs by the Waters-Clark Lumber Company, the difference between the \$413 and \$406 makes the judgment to that extent excessive in the sum of \$7. But there is evidence that the amount of this so-called overpayment on purchase price was in fact only \$377.05. It is quite clear from the record that the \$406 should not have been deducted from the \$700, amount of nonlien time checks held by defendant February 20, 1902, but should have been deducted from \$1,106, the amount of nonlien time checks held by defendant March 29, 1902. The amount of the overpayment on purchase price of logs, however, should have been deducted, and hence the errors do not substantially affect the judgment. It is claimed by counsel for plaintiff that, even though the lumber company paid \$413, or any amount, more than the purchase price of the logs by mistake or otherwise, and that the amount was included in the judgment, it cannot be considered. This position ⁴⁸⁸ is not tenable. If an amount was included in the judgment which should not have been, sufficient substantially to offset the \$406 which was improperly deducted from the judgment, substantial justice was done between the parties in that regard and the judgment should not be disturbed. The trustee acting for the creditors was not entitled to judgment for any amount paid by mistake by the lumber company to Young and turned over by Young to the defendant. It was

no part of Young's assets, and therefore did not become any part of the trust property.

Some other points presented in the brief of counsel for defendant do not strike us as being sufficiently significant to warrant consideration in this opinion, though it should be said that all points presented by counsel have, as it is believed, been fully considered by the court. The amount of the judgment, as we view the matter, is substantially the equivalent of the property which defendant secured by its mortgages. That is all the property, as appears from the record, which it obtained in fraud of the bankrupt act.

Motions for judgment on the verdict were made in plaintiff's behalf, the amounts claimed ranging from upward of \$24,000 down to \$6,660.99. On his appeal he complains of the denial of such motions and seeks to obtain an increase in the judgment awarded. What has been said seems to effectually dispose of all questions presented in that regard. The money paid to defendant on the lien claims was for actual interests in the property paramount to the rights of the plaintiff. We use the term "lien claims" in preference to the term "lienable claims." Under our statute, as construed by this court, such claims are actual interests in the property to which they relate, subject to be defeated by failure to perform certain conditions subsequent made by statute necessary to the preservation and enforcement of the lien. The term "lienable claim" suggests mere right to obtain an interest in specific property instead of an interest in praesenti therein. ⁴⁸⁹ The latter is in the character of a laborer's lien on logs and lumber under our statute. His interest in the property he acquired by performance of the labor: *Smith v. Shell Lake L. Co.*, 68 Wis. 89, 31 N. W. 694; *Viles v. Green*, 91 Wis. 217, 64 N. W. 856. Manifestly a mere realization in money by defendant of its interest in property, which was perfectly valid, was not a violation of the bankrupt act as to unlawful preferences. The only interest, as we have seen, in the property in question, which was acquired by the defendant in violation of such act, was the mortgage interest, and that interest in money value was embodied in the judgment.

By the COURT. The judgment is affirmed on both appeals.

The Principal Case was carried by writ of error to the supreme court of the United States and there affirmed under the title, Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 27 Sup. Ct. Rep. 391, 51 L. ed. 000, in an opinion delivered by Mr. Justice McKenna as follows:

"This action was brought by defendant in error, hereafter called the trustee, in the circuit court of Eau Claire county, state of Wisconsin, against the plaintiff in error, hereafter called the bank, under section 60b of the bankrupt act of 1898 (30 Stats. at Large, 562, 2. 541; U. S. Comp. Stats. 1901, p. 3445), to recover the value of property which, it is alleged, was transferred by the bankrupt to the bank, for the purpose of giving the latter a preference over other creditors. Judgment was recovered by the trustee, which, on appeal, was affirmed by the supreme court of the state: 125 Wis. 465, 104 N. W. 98. Thereupon this writ of error was sued out.

"The complaint of the trustee alleges that on the 7th of June, 1902, John H. Young duly filed his petition in bankruptcy in the United States district court for the western district of Wisconsin, pursuant to the act of Congress, and was on said day duly declared a bankrupt. Subsequently defendant in error was duly elected and appointed by the creditors of the bankrupt as trustee in bankruptcy, and duly qualified as such trustee.

"The plaintiff in error is and was, at all the times mentioned in the complaint, a national bank. Young, during the four months immediately preceding the filing of his petition, was the owner and in possession of certain lumber, shingles, and lath, located at Cadott, Chippewa county, Wisconsin, and certain logs in or near the Yellow river and Chippewa river in Chippewa county, which were reasonably worth the sum of \$35,000. The value of all other property owned by him did not exceed the sum of \$500.

"On the 10th of February, 1902, Young was wholly insolvent, and owed debts which largely exceeded the value of his property, which fact was well known to him and the bank. The aggregate amount of his indebtedness exceeded the sum of \$40,000, and the value of his property was substantially \$35,000. He was indebted to the bank in the sum of \$27,000 for moneys borrowed from time to time for a period of about two years previous to that time. On said day Young executed to the bank a chattel mortgage on 2,100,000 feet of saw-logs, to secure the sum of \$15,900, then owing from him to the bank, and also executed a chattel mortgage, transferring 1,000,000 feet of lumber, about 600,000 shingles, and about 200,000 lath, to secure the sum of \$11,100, owing by him to the bank. This indebtedness existed long prior to said mortgages, and the property transferred constituted substantially all of the property then owned by Young not exempt from execution, which facts were well known by him and the bank. The effect of the foreclosure of the mortgages would be to enable the bank to obtain a much larger percentage of its debt than

would the other creditors of Young in the same class as the bank. The mortgages were given by Young and taken by the bank for the sole purpose of hindering and delaying the other creditors, and were executed and received for that purpose, and the bank, at the time of their execution, had reasonable cause to believe that they were given with the intention to give it a preference over other creditors.

"The Waters-Clark Lumber Company is a corporation of the state of Minnesota, and D. S. Clark is the president thereof and also a director in the bank, and W. K. Coffin is the cashier of the latter. On or about the 10th of March, 1902, Coffin, acting for the bank, requested Young to transfer to the lumber company, for the benefit of the bank, all of the property embraced in the mortgages, together with certain other property. Pursuant to such request Young did, on or about the 10th of March, 1902, transfer, by absolute bills of sale, to the lumber company, all of the property described in the mortgages, and other sawlogs owned by him. The property transferred was reasonably worth the sum of \$35,000. Immediately on the execution of the bills of sale the lumber company, acting pursuant to the directions by and in behalf of the bank, took possession of the property transferred, and thereafter sold the same and applied the proceeds to the payment of the indebtedness secured by the mortgages. At the time the bills of sale were made the lumber company and the bank thought the property transferred constituted all of the available assets of Young, and that the result of such transfer and the appropriation of the proceeds thereof would result in the other creditors of Young losing all of his indebtedness to them. The lumber company, acting as vendee of said property, was in reality acting as trustee for the bank, and made such pretended purchase with the understanding and agreement with the bank and Young that it would account to the bank for the proceeds of the property transferred to the amount of his indebtedness, and that any sums realized in excess of his indebtedness should be paid to Young. The bills of sale were not executed in compliance with the statutes of the state. Except as to the agreement to pay said indebtedness, no consideration was paid by the lumber company for the property, and, at the time of the transfer of the property, nothing was paid to Young therefor. By reason of said transactions the bank, within four months, appropriated to the payment of its claims substantially all of the property of Young, which at said time was and has been ever since worth \$35,000. There is no other property in the possession of the trustee, belonging to Young, out of which his other creditors can be paid.

"The bank demurred to the complaint on the following grounds. The court had no jurisdiction of the subject of the action; the trustee had no legal capacity to sue, in that the complaint did not allege that authority or permission was given him to bring suit; defect

of parties, in that Young and the lumber company were not made parties; and that the complaint did not state a cause of action. The demurrer was overruled, and the bank, availing itself of the permission granted, filed an answer, in which it admitted its corporate character and that of the lumber company, and the execution of the mortgages and the bills of sale, and that the instruments were not executed in the manner provided by the statutes of the state. It denied all the other allegations of the complaint, and alleged that a portion of the proceeds of the sale of the property was paid to the bank to discharge valid and existing liens which it held against the property. And it alleged that the mortgages were given for a good and valuable consideration, and that neither of them nor the payments to the bank were made or received for the purpose of giving the bank a preference over other creditors of Young 'contrary to the provisions of the bankruptcy laws,' and 'that, prior to the commencement of this action, the plaintiff commenced an action in this court against said Waters-Clark Lumber Company to recover from said Waters-Clark Lumber Company the purchase price of logs and other material sold by said Young to said Waters-Clark Lumber Company, and thereby elected to treat and consider said contract between said Young and said Waters-Clark Lumber Company as legal and valid, and elected to look to and hold the said Waters-Clark Lumber Company, instead of this defendant, as liable to said trustee for all sums of money which the said plaintiff may be entitled to recover on account of the transactions mentioned in plaintiff's complaint.'

"Questions were submitted to the jury covering the issues in the case, except the value of the property, which, by stipulation of parties, was reserved for the court. The jury, in response to the questions, found that at all the days mentioned in the complaint the property transferred at a fair valuation was insufficient to pay Young's debts; that the lumber company, acting for the bank and pursuant to the arrangement between it and the bank, took the legal title to the lumber and logs for the benefit of the bank under an agreement with it and Young to account to the bank for a portion of the proceeds; that it was the intention of Young, by the execution of the mortgages and the transfer of the property to give the bank a preference, and that the bank and officers and agents had reasonable cause to believe that Young intended to give it such preference and to enable it to obtain a greater percentage of its indebtedness than any other of his creditors of the same class would be able to obtain.

"The court found that the lumber which was included in the bank's mortgage was worth \$3,452.85, and that a note for that sum and value was given by the lumber company to Young and by him transferred to the bank; that the Cadott logs, included in the mortgage and sold by Young to the lumber company, were worth

\$10,077.84; that the up-river logs not included in the mortgage, but sold to the lumber company by Young, were worth \$11,055.84, and that a note which was given as the net proceeds of the sale of both quantities of logs over and above certain labor liens was worth \$2,508.14. This note was given by the lumber company to Young and transferred by him to the bank. The trustee contended in the trial court that he was entitled to recover for the entire value of the logs and lumber, and that no credit should be allowed the bank for the sums paid by it to discharge certain liens on the property for labor claims and unpaid purchase money. The court rejected the contentions and gave judgment for the trustee in the sum of \$6,254.99. In this sum was included the value of the notes.

"The assignments of error are that the supreme court erred in the following particulars: (1) In determining that the complaint stated a cause of action. (2) In determining that the bank was liable for the value of the logs and lumber to the extent of the chattel mortgage interest of the bank therein. (3) In determining that the bank was liable for having received a preference contrary to sections 60a and 60b of the bankrupt act of July 1, 1898, as 'a portion of its chattel mortgage interest in said logs, the sum of \$1,335.62 as the proceeds of the sale of the portion of said logs known as the "up-river logs," on which logs said defendant never held any chattel mortgage, and which logs were never transferred to said defendant.' (4) In determining that the bank was liable for the value and moneys it received as a preference, although the trustee had not elected to avoid such preference by bringing suit to recover the same, and had not elected to avoid such preference in any manner. (5) And in holding that, in determining a question of preference, it was immaterial, under the bankrupt act, whether the bank and the other creditors were of the same class, and in refusing to reverse the judgment because of the error of the circuit court in charging the jury that all of the creditors were of the same class. (6) In its construction of the bankrupt act in the following particulars: (a) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to obtain any portion of his debt, constituted a preference. (b) That, although the effect of the transfer in question did not operate to give the bank a greater percentage of its debts than other creditors of the same class, such transfer constituted a preference. (c) In determining, by such rules of construction of the bankrupt act, that the evidence was sufficient to establish that the bank had reasonable cause to believe that a preference was intended. (7) (8) (9) In holding that the bank was liable for the full value of the preference received in an amount in excess of what was necessary to pay all the other creditors of the bankrupt, and claims of fictitious creditors and claims of creditors who had themselves received preference, and in not limiting the recov-

ery to such sum as would be sufficient to pay the claims of creditors whose claims were provable. (10) (11) In affirming the judgment against the bank, and not rendering judgment for it.

"A motion is made to dismiss on the ground that the record presents nothing but questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege, or immunity under a federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is urged, were, Did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The supreme court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in *Nutt v. Knut*, 200 U. S. 13, 26 Sup. Ct. Rep. 216, 50 L. ed. 358. It was there said: 'A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709 (U. S. Comp. Stats. 1901, p. 575), to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary': See, also, *Bector v. City Deposit Bank Co.*, 200 U. S. 405, 26 Sup. Ct. Rep. 289, 50 L. ed. 527.

"On the merits of the case we start with the facts established against the bank, that the property of Young at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to pay his debts, and that, by the execution of those instruments, and the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had reasonable cause to believe that he intended thereby to give it a preference, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment. Against this result what does the bank urge? It urges, first, that there is included in the judgment the sum of \$1,335.62, the net proceeds of the sale of certain logs, called the 'up-river logs,' which, it is contended, were not covered by either of the mortgages, and that the supreme court, in its opinion, apparently supposed that those logs were covered by the mortgages, and erred in giving judgment therefor. This is a misunderstanding of the opinion. While the court did not explicitly distinguish between the mortgages and the deed to the lumber company, we think it is clear that the court regarded the deed, and what was to be done under it, as the consummation of the 'legal wrong,' to use the language of the court, which went back to the time of the mortgages. In other words, that the up-river logs

as well as the other property were conveyed to the lumber company for the purpose of giving a preference to the bank.

"The bank also attempts to urge against this conclusion the different views expressed by the trial court and the supreme court upon the finding of the jury as to the relation in which the lumber company stood to the bank. The jury found, in answer to questions 4 and 5, that the lumber company, acting for the bank, took the legal title for the benefit of the latter under an agreement with Young and the bank to account to it for a portion of the proceeds. The trial court said that this was not a finding 'that the lumber company was the agent of the bank.' The supreme court thought that the jury 'pretty clearly decided' that the bank was a principal and the lumber company 'a mere agent' in the matter. It is true the supreme court immediately added: 'However, the evidence seems to clearly establish that the lumber company purchased the property from Young in the regular course of business, without any understanding with the defendant, other than that its interest in the property as mortgagee and claimant under numerous statutory labor liens should be recognized, and the equivalent thereof in money delivered to it out of the proceeds': *Jackman v. Eau Claire N. B.*, 125 Wis. 478, 115 Am. St. Rep. 955, 104 N. W. 102. And this was deemed sufficient to accomplish the preference which Young intended to give the bank. The court passed over, as not important, the distinction between the notes given by the lumber company to Young as the purchase price of the lumber.

"These minor matters out of the way, we come to the more important contentions of the bank. These contentions are expressed in the form of questions, the first of which is: 'Can a trustee in bankruptcy, under the provisions of the bankruptcy act, lawfully maintain a suit to recover the value of a voidable preference without first electing to avoid such preference by notice to the creditor receiving such preference, and by demand for its return?'

"It is urged by the bank that it cannot, and to sustain this contention, that a preference is not void but voidable. And voidable solely at the election of the trustee, who must indicate a purpose to do so. The argument is that, a preference being voidable, the creditor receiving it is not in default until he fail to or refuse to surrender it on demand. Prior to that time his possession is rightful and lawful, and he is not guilty of any wrong, tort, or conversion. And the demand, it is further urged, must be made before suit, for it seems also to be contended that the creditor must be given an opportunity to exercise the election given him by subdivision g of section 57 of the bankrupt act to surrender the preference and prove his claim. We say, 'seems to be contended,' because we are not clear that counsel for the bank claims that the rights of a creditor under 57g depend upon the action of the trustee. Counsel say: 'The bankrupt act, therefore, contemplates that the trustee shall exercise his election as

to whether or not he shall avoid a preference, and it also contemplates that the creditor receiving such alleged preference must exercise an election as to what course he shall take. Until the trustee exercises his election, no cause of action accrues. The creditor is not called upon to elect what course he shall take until the trustee has acted. It therefore follows that the trustee should exercise his election and make his demand before commencing suit.'

"And this, it is argued, is more than a mere question of state practice, and involves the question whether the property consisting of the alleged preference is any part of the trust estate. If it be intended by this to assert that the action of the creditor under 57g is to wait upon or depends upon the action of the trustee under section 60, we do not assent, and nothing can be deduced, therefore, from the supposed relation of those sections as to the necessity of a demand before suit. We do not see how such a demand can even be an element in the consideration of the creditor, whether he will surrender the preference and prove his debt. The right of surrender exists as well after suit as before suit: *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 25 Sup. Ct. Rep. 443, 49 L. ed. 790.

"Independently of such considerations, whether the election by a trustee to avoid a preference should be exercised by a demand before suit, or can be exercised by the suit itself might be difficult to determine if it were necessary on the record: 1 *Chitty's Pleading*, 176, and cases cited; *Shuman v. Fleckenstein*, 4 Saw. 174, Fed. Cas. No. 12,826; *Brooke v. McCracken*, Fed. Cas. No. 1932; *Wright v. Skinner*, 136 Fed. 694; *Goldberg v. Harlan*, 33 Ind. App. 465, 67 N. E. 707. But we do not think it is open to the bank to urge the first. The bank, it is true, demurred to the complaint and urged as a ground of demurrer the absence of an allegation of a demand. But the bank did not stand on the demurrer. It answered, and not only traversed the allegations of the plaintiff, but set up an independent defense, and showed that a demand would have been unavailing, and a demand is not necessary where it is to be presumed that it would have been unavailing: *Davenport v. Ladd*, 38 Minn. 545, 38 N. W. 622; *Bogle v. Gordon*, 39 Kan. 31, 17 Pac. 857. Besides, it appears that a demand was made before suit. In determining from what date interest should be given the trial court said: 'There is evidence of a demand, but I think only a short time elapsed until action was commenced, so that it will make little difference whether interest is computed from the time of the demand or the commencement of the action.'

"The trial court instructed the jury substantially, in the words of subdivision a of section 60 of the bankrupt act, as to when a debtor should be deemed to have given a preference, and, in explanation of the intention of the debtor, said to 'intend to prefer would be to make a transfer for the purpose of enabling the bank to obtain a

greater percentage of its debt than any other debtors of the same class.' And, defining this class of creditors, said further: 'So far as creditors' rights are involved in this action, they are all of the same class, by which is meant they would receive the same percentage of their claims. Claims for taxes or wages within certain times, so as to be preferred, would be of a different class. But claims of general creditors, like those approved in the Young bankruptcy proceedings, are all of the same class.' The bank excepted, and assigned as error the charge that all of the creditors were of the same class. Disposing of the assignment the supreme court said: 'Whether that is right or wrong does not seem to in any way concern the case. This action, as we have indicated, is simply one in trover to recover the value of property which, as is alleged, was, in fraud of the bankrupt act, wrongfully converted by defendant to its own use. Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. If the property was obtained by the defendant in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved.'

"The bank contests this view, and contends that, if accepted, 'it would be impossible to ascertain whether or not the preference had been received without first determining the question of whether the enforcement of the transfer would enable the bank to recover a greater percentage of its debt than other creditors of the same class.' But there is a question of fact to be considered. It was a question of fact what claims were proved against the estate. At the trial the learned judge who presided described them in his instructions as claims of general creditors. In his memorandum opinion he said that, from his minutes and the statements of the evidence in the briefs of counsel, he was inclined to believe that the point was not well taken that the evidence did not show that the effect of the enforcement of the transfer would be to enable the bank to obtain a greater percentage of its debt than other creditors of the same class. 'The bank, in its brief in this court, says: 'Certain other claims were filed and allowed in the bankruptcy proceedings as preferred claims. These were probably claims for wages after the time of the transfers in question.' In the list of claims referred to some only are marked preferred. But, granting that they all were, they were represented by the trustee.

"The other questions propounded by the bank are based on the sixth assignment of error. We will not examine the arguments of counsel for the bank in detail. Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive.

And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the facts found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the supreme court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside. The bank also contends, in effect, that in such suit the validity of all other claims against the bankrupt can be litigated, and whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt's estate from the United States district court to the state court.

"Judgment affirmed."

HAY v. CITY OF BARABOO.

[127 Wis. 1, 105 N. W. 654.]

DEFECTIVE STREETS—Liability of Lot Owners.—The policy of the legislature has been so long and firmly entrenched in our system, to make municipalities liable primarily and directly to sufferers from the failure to keep the public ways in a reasonably safe condition for public travel, that nothing short of some unmistakable repeal of the statute on the subject can reasonably be deemed to have been intended to have that effect. (p. 983.)

DEFECTIVE SIDEWALKS—Liability of Lot Owners.—Where a city charter makes it the duty of lot owners to keep the adjacent sidewalks in repair, and provides that persons injured through any defect in a sidewalk arising out of the wrong or negligence of any person other than the city shall exhaust their legal remedies to enforce the private liability before holding the city liable therefor, the liability referred to is that which results from active wrongdoing, and rests upon common-law principles, independently of statutory enactments. (p. 984.)

DEFECTIVE SIDEWALKS—Liability of Lot Owner.—A city charter provision making it the duty of the owners or occupants of premises in front of which sidewalks are located to keep such walks in repair or pay the expenses incurred by the municipality in doing so, does not impliedly make such owners or occupants liable to travelers for injuries occasioned by the walks being out of repair. (p. 986.)

CITY CHARTER.—The Necessary Effect of Adopting a part of the general charter by a city existing under a special charter is to place such city, pro tanto, under the general law as the same may be from time to time changed. (p. 990.)

STATUTES.—Implied Repeals of Statutes are never favored. Every rule of construction is to be applied without efficiently harmonizing provisions seemingly in conflict, before holding that there is any irreconcilable inconsistency between them. (p. 990.)

DEFECTIVE SIDEWALKS.—Giving Notice to City of Injury.—A notice required by statute to be given the city in case of injury to a person by reason of a want of repair of a sidewalk is a prerequisite to a right to compensation for the injury. (p. 990.)

DEFECTIVE SIDEWALK.—Change in Procedure for Enforcing Liability.—A charter provision prohibiting the enforcement of a right of action for a personal injury suffered from a sidewalk being out of repair, except by presentation of the claim to the city council, and, in case of adverse action, appeal to the district court, is permissible under the rule that an ordinary remedy may be taken away if a new one is given in place thereof. (p. 991.)

DEFECTIVE SIDEWALK.—Giving Notice to City of Injury.—A charter provision that no action shall be maintained against the city to enforce any tortious liability, unless a notice, signed by the person injured, of the wrong and the circumstances thereof and the damage claimed, shall be presented to the council within ninety days after the injury, is a statute of limitations which extinguishes the right of action upon the expiration of the time specified. (p. 991.)

APPEAL AND ERROR.—Reversal of Judgment.—In case of a motion for the direction of a verdict at the close of the evidence being denied and a verdict being rendered for the adverse party, and its being held upon appeal that the motion should have been granted, and for reasons necessarily precluding the losing party from securing any different result by another trial than the one that would have necessarily followed a correct decision of the motion in the first instance, this court may cause the litigation to be terminated in the court below without a new trial, to that end remanding the cause with directions to grant the motion previously denied, and to render judgment accordingly. (pp. 992, 993.)

John M. Kelley and F. R. Bentley, for the appellant.

Daniel M. Grady, for the respondent.

* **MARSHALL, J.** Action to recover compensation for personal injuries alleged to have been sustained by reason of an insufficient sidewalk in the defendant city.

Omitting formal matters, the circumstances relied upon for a cause of action, as alleged, were these: October 22, 1902, about 7 o'clock P. M., plaintiff, while traveling along the sidewalk on the westerly side of Grove street in the defendant city, in the exercise of ordinary care, at a point specifically mentioned, fell and was greatly injured by reason of the insufficiency and want of repair of such walk. The

insufficiency of the walk consisted of a hole therein produced by the removal of one of the decking-boards about eight inches wide and four feet long. Without fault on her part, plaintiff stepped into such hole and was thereby thrown down and her right leg between the knee and ankle injured, her body and her right arm bruised, and she was otherwise severely injured, to her damage in the sum of five thousand dollars. The defendant, through its officers having charge of such matters, knew of such defective condition for several months prior to the injury. October 31, 1902, plaintiff caused written notice of the injury to be personally served on the mayor and clerk of the city, stating the time and place of the injury, the ⁵ insufficiency and want of repair causing the same, and that she claimed satisfaction for her injury. January 28, 1903, plaintiff caused a written notice of her claim to be served personally on the mayor and clerk of the defendant, and to be filed with the city clerk, stating the time and place of the injury and describing the insufficiency which caused it, and the amount of damages sustained. March 26, 1903, her claim was duly rejected by the city, and two days thereafter notice of such rejection was served upon plaintiff. April 14th thereafter plaintiff duly appealed to the circuit court from such disallowance, giving notice and filing a bond as required by law in such cases. The damages claimed were for five thousand dollars.

The defendant answered, putting in issue the allegations to the effect that section 1339 of the Statutes of 1898, respecting the service of written notice of the injury was complied with, and alleging as follows: No statement in writing was presented to the common council in accordance with section 26, subchapter 12, chapter 21 of the Laws of 1882; sections 6-8, subchapter 5, chapter 21 of the Laws of 1882, regulating the subject of disallowance of such claims by the defendant, and appeals therefrom, were not complied with, particularly in that the bond therein required was not given; the time for presenting the alleged claim under section 26 aforesaid expired January 20, 1903. Plaintiff having failed to comply with the requirements of defendant's charter referred to, no claim on the part of the plaintiff was ever perfected against the city for the alleged injury. Sections 28, 29, subchapter 12, of the aforesaid law imposed upon the owner or occupant of property abutting on a street the duty of keep-

ing the sidewalk in repair. The premises in front of which the injury is alleged to have occurred were occupied by a tenant of the owner. It was his duty to keep the sidewalk in a safe condition. The remedies against him and his landlord have not been exhausted. The alleged injuries were caused by plaintiff's want of ordinary care. She knew of the condition ⁶ of the walk, but proceeded thereon regardless of the existence of the defects therein.

At the commencement of the trial there was a demurrer to the complaint *ore tenus*, based on the theory that whereas the city adopted sections 925—58 to 925—60, of the Statutes of 1898, a part of the general city charter law, the effect thereof was to substitute the adopted portion of the general charter in place of section 8, subchapter 12 of the city charter still in force, and that such provision governed the subject of enforcing such a claim against the city; that the charter was amended by the adoption of the general charter provision, as aforesaid, in March, 1898, before the statutes of 1898 went into effect.

At the close of plaintiff's case there was a motion made for the direction of a verdict, which was denied. At the close of all the evidence there was a motion made for a verdict in favor of the defendant, which was denied. The cause was submitted to the jury upon the evidence under instructions, resulting in a verdict in plaintiff's favor for five hundred dollars. Proper motions were made and exceptions taken to preserve for review questions treated in the opinion. Judgment was rendered in plaintiff's favor upon the verdict, and defendant appealed.

Appellant's charter at section 29, subchapter 12, chapter 21, of the laws of 1882, provides that "the duty of always keeping the sidewalks . . . on or adjacent to the lots and premises of any person, in safe condition and good repair, is hereby expressly enjoined and imposed upon all owners or occupants of said lots and premises," and the preceding section provides that "in case of injury or damage by reason of ⁷ insufficient, defective or dangerous condition of [a] . . . sidewalk . . . produced or caused by the wrong, neglect of duty, default or negligence of any person or corporation, such person or corporation shall be primarily liable for all damages for such injury, in suit for the recovery thereof by the person sustaining such damages, and the city shall not be lia-

ble therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation."

The evidence tended to show that the injury complained of was caused by the defective condition of a sidewalk in front of occupied premises, and that no effort was made by respondent prior to the commencement of this action, or at any time, to recover her damages of such occupant or the owner of such premises. The complaint, as indicated by the statement, was barren of all allegations in respect to liability of such owner or occupant.

Counsel for appellant insist that under the circumstances stated the trial court should have sustained the demurrer to evidence, and, failing in that, should have granted the motion for a verdict at the close of respondent's evidence in chief, and failing in that should have granted the motion for a verdict at the close of all the evidence. That is grounded on *Amos v. Fond du Lac*, 46 Wis. 695, 1 N. W. 346; *Hiner v. Fond du Lac*, 71 Wis. 74, 36 N. W. 632; *Henker v. Fond du Lac*, 71 Wis. 616, 31 N. W. 187; *Devine v. Fond du Lac*, 113 Wis. 61, 88 N. W. 913; *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. 457. On the other hand, counsel for respondent argue that the provisions of the charter referred to are entirely unlike those in the charter of the city of Fond du Lac; that they are in all essential particulars like those in the charter of the city of Green Bay, and in that of the city of Janesville, which have been held to permit of enforcing the city liability in a case like this without reference to any liability of the owner or occupant of the premises in front of which the injury occurred: *Toutloff v. Green Bay*, 91 Wis. 490, 65 N. W. 168; *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36.

In the Green Bay charter the only provisions bearing on the subject here were: First, one giving the city full authority to control and repair the sidewalks: Laws 1882, c. 169, subc. 4, subd. 40, sec. 3. Second, one whereby the expense of keeping sidewalks in repair was made chargeable to abutting lots, and the duty of keeping the sidewalks in a safe condition and good repair was enjoined upon the owners or occupants of lots: Sec. 5, subc. 6. Third, one making it the duty of the street superintendent to inspect the walks from time to time as needed, and properly repair all defects not requiring an outlay exceeding five dollars in any one instance,

and in other circumstances to make the repairs in case of the owner of the lot neglecting to make them within twenty-four hours after being notified so to do, the expense in any case being chargeable against the lot: Sec. 7, subc. 6. The court reached the conclusion that the liability of the lot owner was to the city only, and merely to repair the walk when ordered to do so or to pay the expenses thereof. There was no expression in the charter anywhere, in terms or in effect, that he should be liable primarily or otherwise directly to a traveler injured by a want of repair of the walk.

In the Janesville charter considered in *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36, there were provisions, in effect, as it was said, the same as in the Green Bay charter. The city was given absolute control over the streets, with power to improve the same for public use, but as to the making of sidewalks only at the expense of the owners of abutting lots: Laws 1882, c. 221, sec. 1, subc. 7, subd. 4, sec. 23. The duty, in case of the construction of a sidewalk, of making it reasonably safe and suitable for public travel and keeping it in such condition was imposed on the city by section 1339 of the Statutes of 1898, unaffected by charter provision, since there was nothing therein creating such duty nor any inconsistent with the general ^o law: *Kittridge v. Milwaukee*, 26 Wis. 46; *Harper v. Milwaukee*, 30 Wis. 365; *Ripon v. Bittel*, 30 Wis. 614; *Hincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735, 1 N. W. 230; *Huston v. Fort Atkinson*, 56 Wis. 350, 14 N. W. 444. Those cases show clearly that it has not, since the inception of our system of statutory liability of municipalities for reasonably safe condition for public use of streets and sidewalks been supposed to be necessary to search a city charter in any case to discover whether such liability was imposed thereby or not. Charter provisions in respect to the matter have been examined only to discover whether the general law on the subject in any particular was modified or repealed.

On the subject of liability of lot owners for damages as regards sidewalks, section 19, subchapter 12, chapter 221, aforesaid provided, if not repealed, as follows: "Whenever any injury shall happen to persons or property in said city by reason of any defect in any street, sidewalk, alley or public ground, or from any other cause for which the said city would be liable, and such defect or other cause of such injury shall

arise from or be produced by the wrong, default or negligence of any person or corporation other than said city, such person or corporation, so guilty of such wrong, default or negligence, shall be primarily liable for all damages for such injury, and the said city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation."

By section 3, chapter 102 of the laws of 1889, amending subdivision 4, section 23, aforesaid, there was imposed on lot owners the duty of repairing sidewalks in front of their premises more specifically than before, this language being used: "It shall be the duty of the owner or owners of each lot or parcel of land abutting upon any street within the city to . . . keep in repair, at his or their own expense, a standard sidewalk in front of said lot or parcel of land, and if no standard sidewalk shall have been fixed for said street, or that part thereof, ¹⁰ where the land of such owner or owners is situated, then such a good and sufficient sidewalk as shall be approved by the street commissioner. Whenever the owner or owners of any lot or parcel of land abutting upon any street shall fail or neglect to . . . keep such sidewalk in good and proper repair," the same may be done by the city at his expense, the manner of doing the same and enforcing the liability for such expense being particularly pointed out. Taking all of the provisions of the charter together, it was said in *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36, that they left the city absolutely liable under the general statute for reasonable safety of its sidewalks, and made lot owners absolutely liable to the city to execute its duty to repair such walks, or reimburse it for the expenses thereof. As reasoned in *Toutloff v. Green Bay*, 91 Wis. 490, 65 N. W. 168, it was held that the policy of the legislature had been so long and firmly entrenched in our system to make municipalities liable primarily and directly to sufferers from the failure to keep the public ways in a reasonably safe condition for public travel that nothing short of some unmistakable repeal of the statute on the subject could reasonably be deemed to have been intended for that effect.

Taking the amended provisions of the law of 1889 with section 19, subchapter 12, of the Janesville charter, which we have quoted, by themselves, they seemed to exempt the city from any primary liability for injuries caused by de-

fective sidewalks, but when to reach that conclusion it was necessary to hold that section 1339 of the statutes of 1898, was repealed, as regards giving injured persons any direct remedy against the city, the rule came into operation that statutes should not be deemed to have been repealed by implication, if by any reasonable construction that result is avoidable: *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357.

The fact that section 19, subchapter 12, of the Janesville charter aforesaid existed before there was any provision thereof imposing a duty on lot owners to repair sidewalks, and that it ¹¹ was not associated in the amended charter with the provisions in relation to the repair of streets and sidewalks, the latter being in subchapter 7 relating to streets and highways, and the former in subchapter 12 relating to miscellaneous provisions, rather repelled the idea that the general law on the subject of statutory municipal liability was intended to be to any extent superseded. Such idea was further repelled by the settled policy of protecting travelers from the consequences of defective public ways by the responsibility of the public corporation controlling the same, and that to give in addition the liability of abutting lot owners and compel that to be exhausted before resorting to municipal liability, instead of giving additional protection to the traveling public, impaired the protection theretofore existing: *Toutloff v. Green Bay*, 91 Wis. 490, 65 N. W. 168. Such idea was further repelled by the fact that, while the duty of lot owners to repair sidewalks was of no substantial benefit to the public over that secured to them under the general statutes, it was of great benefit to the municipality, in that all the expense of making the repairs was entirely shifted from it to the lot owner. Looking at the words of section 19, subchapter 12—which are precisely the same as section 28, subchapter 12, of appellant's charter, making the liability as between the injured person and the owner of the lot abutting on the street where the injury occurred primary, "whenever any injury shall happen . . . by reason of any defect . . . for which the city would be liable, and such defect or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation other than said city, such person or corporation . . . shall be primarily liable"—it seemed reasonable in deciding the *Selleck* case (93 Wis. 246, 67 N. W. 36), to conclude that they referred not to statutory liability,

but to liability for the results of active wrongdoing, such as would render the municipality liable independently of the statute—those liabilities which rest upon a city the same as on an individual upon ¹² common-law principles: such as are referred to in *Hincks v. Milwaukee*, 46 Wis. 559, 1 N. W. 230; *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407, and similar cases. In that the court followed numerous decisions where the same or similar language was construed.

In the first case cited the language under consideration was this: "Whenever any injury shall happen to persons or property in the said city of Milwaukee, by reason of any defect or encumbrance on any . . . sidewalk . . . or from any other cause for which the said city would be liable, and such defect, . . . or other cause of such injury shall arise from or be produced by the wrong, default or negligence of any person or corporation, such person or corporation so guilty of such wrong, default or negligence shall be primarily liable for all damages for such injury; and the city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation."

That language in the Milwaukee charter is probably the parent of the similar provision in appellant's and in many other charters in this state. It was incorporated into the charter of the city of Sheboygan, and thus construed in *Raymond v. Sheboygan*, 70 Wis. 318, 35 N. W. 540: "The very obvious intent and meaning of this provision is to require the injured party first to exhaust all legal remedies to collect his damages from the wrongdoer or person causing the defect . . . before the liability of the city shall be enforced. . . . It was intended to relieve 'the city, as far as possible with justice to the injured party, from liability for injuries occasioned by obstructions unlawfully placed in its streets by persons for whose acts it was not directly responsible, and that whenever the person injured can, by use of the remedies furnished him by the law, recover his damages of the party primarily in fault, therefore primarily liable,' he must do so before resorting to his remedy against the city."

Much confusion exists in failing to differentiate between those circumstances where the liability of the city was wholly ¹³ statutory and the only one to be resorted to, and the circumstances where the city was liable by statute and upon common-law principles as well, or upon the latter only, and

there was also liability upon common-law principles of a private person, giving the injured party, in the absence of any statutory regulation, an absolute choice of remedies or the right to enforce both liabilities in one action. As to the latter such charter provisions as those we have under consideration do not create a right or give a remedy for its enforcement. They merely regulate the same, providing that the one primarily to blame shall be primarily called to account.

The method of approach adopted when this question was first presented here for adjudication was to claim that since the city charter imposed upon lot owners the duty to repair, the principle should apply that where the law imposes a specific duty upon one person for the benefit of another an action will lie in favor of that other against that one, in case of there being damage by failure of such person in the performance of such duty. But the premises upon which the rule was invoked were found wanting, in that the duty to repair was not imposed on the lot owner for the benefit of travelers, but in the aid of the execution by the city of its duty created by general law or its charter, or both.

Turning to the cases upon which counsel for appellant rely, we can readily see why the construction adopted as to charter provisions, such as those in question, could not apply to the charter of the city of Fond du Lac. In the latter the legislature in unmistakable language not only imposed upon lot owners the duty to repair sidewalks in front of their premises for the benefit of travelers, but *ex industria* construed its enactment. Reading the language of sections 1, 2, subchapter 18, chapter 152 of the laws of 1883—the Fond du Lac charter—together we have this, in case of injury or damage happening to anyone by reason of insufficiency of a sidewalk: "Every owner of any lot, part of lot, or parcel of land, in said city . . . in front of, or adjoining, which there shall¹⁴ have been or shall hereafter be placed . . . any walk, or sidewalk, . . . shall at all times keep and maintain said walk or sidewalk, . . . in a safe, convenient and effective condition, for the use of any person or persons desirous to walk thereon; and any person who may have been or shall hereafter be injured by reason of the unsafe or defective condition of such walk, or sidewalk, shall have the right to maintain an action . . . against such owner . . . for all damages or injury of every nature, resulting to such per-

son by reason of the neglect of such owner. . . . It is hereby declared to be the true meaning and intent of this act, that the said city of Fond du Lac shall not, in any case, be liable to any person or persons, for damages resulting from the defective, unsafe or dangerous condition of any walk or sidewalk, and the only cause of action to which the said city of Fond du Lac shall be liable, or which shall be maintained in any court against said city, in connection with, or relation to damages resulting from failure to keep the walks or sidewalks in said city, in a safe, condition, shall be by reason of the failure of any person or persons to collect a judgment recovered against such owner, or owners, for any such damages, resulting from such injuries, as hereinbefore stated."

Thus it will be seen that the legislature unmistakably created a private liability where one did not previously exist, and made it the sole resort of the injured party, until such time as it should be established that, without liability of the city also, he would be remediless. The charter gave him an absolutely new right and provided for its enforcement, special care being taken to indicate that the purpose of the enactment was to displace the general law on the subject of municipal liability, so far as inconsistent therewith.

The foregoing analysis would seem to demonstrate that there is no similarity whatever between appellant's charter and the charter of the city of Fond du Lac; and that the former is in all essential particulars similar to the charter of the city of Janesville, as it existed at the time of the decision in *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36. It follows that, subject to the provisions of law requisite to perfect, and the provisions for the ¹⁵ enforcement of it, the liability in this case was primarily and exclusively against the city.

It is a verity in the case that appellant adopted parts of the general charter law, as stated in the answer, prior to the happening of the injury. Before such adoption the charter system for the enforcement of all liabilities of the city of a contractual nature, with some slight exceptions was embodied in sections 5-8, subchapter 5, chapter 21 of the laws of 1882. They provided: First, for the allowance by the common council of such a claim only upon its presentation to such council properly itemized and verified by the owner or some person in his behalf. Second, in case of disallowance of the claim,

for further prosecution of the matter only by appeal to the circuit court from such disallowance. Third, for the entry of the appeal, upon the papers being duly transmitted to the clerk of the circuit court, and trial of the matter as in case of an action appealed from justice court. Fourth, that action on any claim against the city, with certain exceptions not referring to such liabilities as the one involved here, other than as indicated, was prohibited; and the determination of the council was made conclusive and a perpetual bar to any proceedings to recover thereon, in the absence of an appeal being taken within the time and in the manner pointed out, save only a remedy by action commenced in the ordinary way was preserved in case of a refusal by the council to act in the matter upon the claim being properly presented therefor. The ordinary method of enforcing liabilities of a tortious character was left unaffected by the charter, but the right to the ordinary remedy was limited by section 26, subchapter 12, of the charter in these words: "No action in tort shall lie or be maintained against the city of Baraboo, unless a statement in writing, signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and amount of damages claimed, shall be presented to the common council within ninety days after the occurring or happening of the tort alleged."

¹⁶ The allegations of the complaint as to nonperformance of the condition mentioned were established by the evidence. Counsel for appellant insisted upon the trial, and still insists, that such nonperformance extinguished whatever right respondent had against the city, the same as the operation of any full limitation period set by law for the enforcement of any right by a judicial remedy extinguishes such right. Respondent's counsel contends that said section 26 was repealed by the adoption of the general charter system for the enforcement of municipal liabilities. If the former are right, a verdict of no cause of action should have been directed in appellant's favor.

It is not claimed that there was any repeal of the limitation clause of the special charter other than by implication. The adoption proceedings expressly made those parts of the general charter law relating to the enforcement of municipal liabilities as they existed in March, 1898, a part of the special charter, in lieu of the system therein for the enforcement of all claims of a contractual nature: Secs. 6-8, subchapter 5,

before referred to. The general charter system was then embodied in section 58, chapter 326 of the laws of 1889, as amended by section 27, chapter 312 of the laws of 1893, and sections 59 and 60 of said chapter 326. In its entirety it provided as the only means for enforcing any claim or demand of any kind or character against a city, presentation thereof to the common council for allowance, and in case of adverse action, or failure to pass upon the matter at all within sixty days after such presentation, an appeal to the circuit court within the time and in the manner specified. Express or constructive disallowance of the claim, and failure to invoke efficiently such appeal remedy, rendered such disallowance final and conclusive and a bar to any action in any court in respect thereto.

It is suggested that those parts of the general charter law, adopted as stated, were changed by the revision of 1898, and that section 58 of the general charter was subsequently changed ¹⁷ by chapter 127 of the laws of 1899. We do not deem it necessary to discuss that matter. The parts adopted were at the time of adoption to the effect we have indicated. Notwithstanding any changes which subsequently occurred, they were the same in every essential particular at the time of the occurrence complained of as when adopted. They are included in sections 925—58 to 925—60 of the statutes of 1898, as amended by chapter 127 of the laws of 1899. That the change in the special charter entirely superseded that part thereof contained in said sections 6-8, subchapter 5, as to the enforcement of claims of a contractual character, and also the ordinary remedy for the enforcement of actions of a tortious character, there can be no reasonable doubt: *Sheel v. Appleton*, 49 Wis. 125, 5 N. W. 27; *Mason v. Ashland*, 98 Wis. 540, 65 N. W. 168; *Watson v. Appleton*, 62 Wis. 267, 22 N. W. 475; *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674; *Telford v. Ashland*, 100 Wis. 238, 75 N. W. 1006; *Gutta Percha & R. Mfg. Co. v. Ashland*, 100 Wis. 232, 75 N. W. 1007; *Seegar v. Ashland*, 101 Wis. 515, 77 N. W. 880; *Morgan v. Rhineland*, 105 Wis. 138, 81 N. W. 132. The language of section 58 of the general charter, as it stood at the time of the happening of the injury, was substantially the same as that considered in the cited cases, and required every claim or demand of every character whatsoever to be enforced, if at all, by presentation thereof to the common council for allowance. The effect of the adoption of such section as an

amendment to the special charter was to make all subsequent changes in such section modifications of the special charter accordingly. The necessary effect of adopting a part of the general charter by a city existing under a special charter is to place such city *pro tanto* under the general law as the same may be from time to time changed. That precise point has not heretofore been decided, but the same seems to be too clear for reasonable controversy.

We are unable to discover in the argument of counsel for respondent, or otherwise, any efficient answer to the contention ¹⁸ of counsel for appellant that the limitation clause of appellant's charter, as to the prosecution of actions of this sort, as it existed prior to the adoption of the general charter provisions, was not changed thereby.

As before suggested, there was no express repeal, except of sections 6-8, subchapter 5, before referred to. Implied repeals are never favored. Every rule of construction is to be applied without efficiently harmonizing provisions seemingly in conflict, before holding that there is any irreconcilable inconsistency between them: *Mason v. Ashland*, 98 Wis. 540, 65 N. W. 168. It does not seem that we need to go that far in this case because there is no apparent conflict to be dealt with, as we read the charter provisions. Section 26, subchapter 12, of appellant's charter relates wholly to a subject entirely foreign to sections 58-60 of the general charter law, as they existed at the time of the injury in question. The former is a limitation upon the use of judicial remedies for the enforcement of a right—a statute of limitations pure and simple. The latter is a substitute for the ordinary method of invoking judicial remedies for the enforcement of rights. The ordinary remedy is taken away and a new one is given in place thereof, which is permissible. It is no more inconsistent with the limitation feature than with section 1339 of the statutes of 1898, as regards the existence of a right of the sort here involved. The three together make this complete system. The right to hold the city liable upon its statutory obligation to keep its sidewalks reasonably safe for public travel, in case of an injury to person or property by a breach of such obligation, is conditioned upon compliance with said section 1339, as regards, within fifteen days after the happening of the event causing the injury, giving notice in writing signed by the party, his agent or attorney, to the mayor or city clerk, stating the place where the dam-

ages occurred and describing generally the insufficiency, or want of repair, which occasioned it, and that satisfaction therefor is claimed of the city. The remedy for vindicating the right, when it shall ¹⁹ have been established in the manner aforesaid, is governed by the general charter provisions adopted as before indicated. The condition of the right to use such remedy is in section 26, subchapter 12 of the charter prohibiting the same, "unless a statement in writing, signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and amount of damages claimed, shall be presented to the common council within ninety days after the occurring or happening of the tort alleged." As respondent failed to comply with that condition her right to damages, though perfected by complying with section 1339 of the statutes of 1898, ceased to exist before she commenced her action, so to speak, in the only way open to her in any event, by presenting her claim to the common council for allowance under section 58 of the general law. There is no manner of escape from this. One law is a condition of the existence of a right, another gives a new remedy for the enforcement of the right in place of the old one, and another operates upon the remedy and may extinguish it. That said section 26 was intended as a limitation upon the right to a remedy is very clear. That it must be given the same force as is accorded to other limitation acts, so far as it goes, is just as clear. Any law creating a condition of the enforcement of a right to be performed within a fixed time is a statute of limitations with all that the term signifies. That is elementary. It has been applied in many cases, notably in *Relyea v. Tomahawk P. & P. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412.

It follows that the motion for a direction of a verdict in defendant's favor at the close of the evidence should have been granted. Further proceedings, under the circumstances, in the court below, other than such as may be necessary for the dismissal of the action, with costs in favor of the defendant, would be useless. As stated in *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800, in the language of Mr. Justice Winslow, "the substance of the requirement" as to proceedings in the trial court for judgment for one party, when taking the ²⁰ verdict at its face the judgment should and does go the other way, to entitle such party upon prevailing on appeal to a direction from this to the lower court to render judg-

ment in his favor, "is that the appellant shall move for judgment after the verdict is in, so that the trial court may have an opportunity to pass on the question." The real philosophy of that, it seems, is that when one obtains judgment in the trial court, though upon the pleadings and the evidence the right of the matter is conclusively with his adversary, such court must be so challenged in respect thereto by the latter to at least afford it ample opportunity to considerably pass upon the matter in order to enable the one aggrieved to obtain a direction for judgment upon his successfully appealing to this court. No reason is perceived why that is not as fully satisfied when a motion is made in the trial court for a verdict upon the pleadings and evidence, as where one is made thereon for a judgment regardless of the verdict. In practical effect, the point the court is called upon to decide in one case is the same as in the other. The opportunity to decide the matter considerably is the same whether the motion is made before or after verdict.

Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800, responding to the spirit of the code, and it is believed its letter as well, distinctly repudiated the old practice that only the plaintiff can successfully invoke the trial court for judgment notwithstanding the verdict. It changed the practice theretofore somewhat intrenched here, rendering necessary a motion in such court for such changes in a verdict rendered contrary to facts conclusively established, necessary to make it harmonize with such facts, and on its face support a judgment, in order to warrant this court, upon the party aggrieved by a judgment upon the erroneous verdict prevailing upon appeal, in directing the entry of such a judgment as will end the litigation. It held that a motion after verdict was sufficient to enable the court to pass upon the matter, which satisfied all reasonable requirements, leaving the erroneous verdict, or any verdict, as without ²¹ necessary significance. It brushed away, so to speak, all mere forms, whether of the ancient or modern practice, because the basic reasons therefor are only to be found, as was said, "in fine-spun distinctions, more fanciful than convincing," and anchored firmly to the substance of things rather than to mere shadows and useless forms. It would seem that the advanced position so taken logically warrants us in holding, if it does not require us to do so, that upon a recovery here, the prevailing party having in the court below made a motion for the disposition

of the cause in his favor by the direction of a verdict, thus affording such court full opportunity to pass upon the very matter presented here, the cause may be remanded for the judgment which would necessarily have resulted from the granting of such motion, when it conclusively appears that in no event could a new trial otherwise result. That would be strictly within the letter of section 3071 of the statutes of 1898, providing that upon a reversal here a cause may be remanded for a new trial "if proper and necessary," and strictly in harmony with the fact that our system is governed by the code, and the practice not inconsistent therewith, which this court, under its inherent and statutory power, sees fit to establish.

By the COURT. The judgment is reversed, and the cause remanded, with directions to enter judgment dismissing the action, with costs in favor of defendant.

A motion for a rehearing was denied January 30, 1906.

LIABILITY OF PROPERTY OWNERS TO PERSONS INJURED BY NONREPAIR OF STREETS.

I. At the Common Law.

a. The General Rule, 993.

b. In Case Owner Himself Causes Defect, 994.

II. Under Legislative Enactments.

a. Constitutionality of Statutes, 994.

b. Interpretation and Effect of Statutes, 995.

c. Necessity of Notifying Owner to Make Repairs, 996.

I. At the Common Law.

a. The General Rule.—The common law casts no duty upon the owner of property abutting upon a public street to maintain the street or sidewalk in a good state of repair. In the absence of any legislative enactment he is not liable for an injury due to a defect in the street or sidewalk in front of his premises unless he himself has caused the defect: *Eustace v. Jahns*, 38 Cal. 3; *Martinovich v. Wooley*, 128 Cal. 141, 60 Pac. 760; *Lynch v. Hubbard*, 101 Mich. 43, 59 N. W. 443; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Beck v. Ferd Heim B. Co.*, 167 Mo. 195, 66 S. W. 928; *City of Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937, 10 L. R. A. 393; *Village of Fulton v. Tucker*, 3 Hun, 529; *Krebs v. Heitman*, 104 App. Div. 173, 93 N. Y. Supp. 542; *Sneeson v. Kupfer*, 21 R. I. 560, 45 Atl. 579; note to *Browning v. City of Springfield*, 63 Am. Dec. 355. To quote from the recent case of *Mullins v. Siegel-Cooper Co.*, 183 N. Y. 129, 75 N. E. 1112: "The principles of law applicable to the obligation of abutting owners on city streets to keep the sidewalk in a safe condition for pedestrians are well settled. The abut-

ting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirements of the statute, and is not responsible to travelers for defects therein not caused by himself."

b. In Case Owner Himself Causes Defect.—The immunity of a lot owner from liability from defects in streets does not extend to those cases where the defects are occasioned by his own acts. If he creates a defective or dangerous condition in the street or sidewalk, perhaps in his use thereof to his individual advantage or in the enjoyment of his adjoining property, his conduct becomes unlawful on common-law principles, and he is answerable for injuries occasioned to third persons: *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375; *Canfield v. Chicago etc. Ry. Co.*, 78 Mich. 356, 44 N. W. 385; *Land-rue v. Loud*, 38 Minn. 538, 38 N. W. 699; *Mayor etc. of New York v. Dimick*, 20 Abb. N. C. 15, affirmed in 49 Hun, 241, 2 N. Y. Supp. 46; *Mullins v. Seigel-Cooper Co.*, 95 App. Div. 234, 88 N. Y. Supp. 737; *Tremblay v. Harmony Mills*, 171 N. Y. 598, 64 N. E. 501; *Brown v. White*, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321; *City of San Antonio v. Talerico*, 98 Tex. 151, 81 S. W. 518.

Thus, a property owner who maintains a trapdoor, manhole, coal-hole, or other opening in the sidewalk, must see that the same is kept in a condition which will not imperil the lives or limbs of pedestrians. If he fails to do so, he is answerable for the consequences: *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55, 13 Pac. 357; *Calder v. Smalley*, 66 Iowa, 219, 55 Am. Rep. 270, 23 N. W. 638; *McDonald v. Logi*, 143 Ill. 487, 32 N. E. 423; *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78; *City of Wabasha v. Southworth*, 54 Minn. 79, 55 N. W. 818; *Ray v. Jones & Adams Co.*, 92 Minn. 101, 99 N. W. 782; *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274, 34 S. W. 590; *Perrigo v. St. Louis*, 185 Mo. 274, 84 S. W. 30; *O'Malley v. Gerth*, 67 N. J. L. 610, 52 Atl. 563; *Matthews v. De Grof*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Berger v. Content*, 47 Misc. Rep. 390, 94 N. Y. Supp. 12; *Dickson v. Hollister*, 123 Pa. 421, 10 Am. St. Rep. 533, 16 Atl. 484.

And if he makes an excavation in the street or sidewalk, and neglects to restore the way to a safe condition, or leaves it without guards or barriers, he must respond in damages to one who suffers injuries therefrom: *Covington etc. Mfg. Co. v. Drexilius*, 27 Ky. Law Rep. 903, 87 S. W. 266; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Smith v. Ryan*, 130 N. Y. 653, 29 N. E. 1033; *City of Dayton v. Taylor's Admr.*, 62 Ohio St. 11, 56 N. E. 480; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389; *Borchers v. Galvin* (Tex. Civ. App.), 37 S. W. 178.

II. Under Legislative Enactments.

a. Constitutionality of Statutes.—It is competent for the legislature to impose upon adjacent lot owners the duty of keeping the

sidewalks in front of their property in repair, and to make them liable for injuries occasioned by reason of the defective condition of such sidewalks: *City of Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478, 89 N. W. 280, 56 L. R. A. 762; *McKibben v. Amory*, 89 Wis. 607, 62 N. W. 416. It has been thought, however, that a city charter providing that the owners of lands abutting on streets shall construct and maintain sidewalks, and that they shall be liable to all persons injured by their failure to keep them in repair and safe for travelers, is, as to the latter provision, unconstitutional so far as it imposes a liability to others than the city: *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444.

b. Interpretation and Effect of Statutes.—Although abutting owners have in some instances been held primarily liable for injuries caused by the defective condition of sidewalks, by virtue of their promise to repair them or by reason of their duty so to do as declared by ordinance (*Dutton v. Lansdowne Borough*, 198 Pa. 563, 82 Am. St. Rep. 814, 48 Atl. 494, 53 L. R. A. 469; *New Castle v. Kurtz*, 210 Pa. 183, 105 Am. St. Rep. 798, 59 Atl. 989, 69 L. R. A. 488; *Devine v. Fond du Lac*, 113 Wis. 61, 88 N. W. 913), the courts have generally shown a disposition to place a strict construction on legislative enactments looking toward any change in the common-law duty of property owners to keep sidewalks in repair: See the principal case, ante, p. 977. It has been decided that a charter provision that if a lot owner neglects to construct or repair a sidewalk, as ordered by the common council, and the city is compelled to pay damages for an injury to a person on account of such neglect, the lot owner shall be liable to the city for the amount so paid, does not authorize the injured person to bring a suit against the property owner: *Lynch v. Hubbard*, 101 Mich. 43, 5 N. W. 443.

A city charter provision making it the duty of the owners or occupants of premises in front of which sidewalks are located to keep such walks in repair or pay the expenses incurred by the municipality in doing so, does not impliedly make such owners or occupants liable to travelers for injuries occasioned by the walks being out of repair: See the principal case, ante, p. 977; *City of Keokuk v. Ind. District of Keokuk*, 53 Iowa, 352, 36 Am. Rep. 226, 3 N. W. 503; *Betz v. Limingi*, 46 La. Ann. 1113, 49 Am. St. Rep. 344, 15 South. 385; *Rupp v. Burgess*, 70 N. J. L. 7, 56 Atl. 166; *City of Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, 25 N. E. 937, 10 L. R. A. 393; *Law v. Kingsley*, 82 Hun, 76, 31 N. Y. Supp. 88; *Wilhelm v. Defiance*, 58 Ohio St. 56, 65 Am. St. Rep. 745, 50 N. E. 18, 40 L. R. A. 294; *Cooper v. Village of Waterloo*, 88 Wis. 433, 60 N. W. 714; *Fife v. City of Oshkosh*, 89 Wis. 540, 62 N. W. 541; *Sommers v. Marshfield*, 90 Wis. 59, 62 N. W. 937; *Toutlaff v. Green Bay*, 91 Wis. 490, 65 N. W. 168. The purpose of such charter provisions is not to protect individuals who make use of the sidewalks

and to furnish them indemnity for injuries which they may sustain, but rather to furnish the municipality, by a proper distribution of burdens, the means of discharging its duties.

In addition to the above provision, some city charters also provide that in case of an injury to person or property by reason of any defect in a sidewalk for which the city would be liable, arising from or produced by the wrong, default, or negligence of any person other than the city, the guilty person shall be primarily liable therefor; and it has been decided that under such a charter a lot owner is not liable to a passer-by for an injury caused by a mere failure to keep the sidewalk in repair, the charter provision having reference only to injuries caused by active negligence of the lot owner in obstructing the walks or otherwise rendering them unsafe, which acts create a common-law liability: *Selleck v. Tallman*, 93 Wis. 246, 67 N. W. 36. This doctrine is approved in the principal case, where the court said: "The policy of the legislature has been so long and firmly entrenched in our system to make municipalities liable primarily and directly to sufferers from the failure to keep public ways in a reasonably safe condition for public travel, that nothing short of some unmistakable repeal of the statute on the subject could reasonably be deemed to have been intended for that effect."

c. **Necessity of Notifying Owner to Make Repairs.**—A statute conferring upon city authorities complete jurisdiction and control over streets and sidewalks, requiring adjacent owners or occupiers of lots to build and repair sidewalks in compliance with notice from the city authorities, and making such owners or occupiers liable for all damages resulting from defective sidewalks, does not impose upon them an absolute duty to repair upon their own motion, but only the duty to repair after notice from the city authorities: *City of Lincoln v. Janesch*, 63 Neb. 707, 93 Am. St. Rep. 478, 89 N. W. 280, 56 L. R. A. 762. To the same effect, see *Martinovich v. Wooley*, 128 Cal. 141, 60 Pac. 760; *Lynch v. Hubbard*, 101 Mich. 43, 59 N. W. 443.

CARY v. PREFERRED ACCIDENT INSURANCE COMPANY.

[127 Wis. 67, 106 N. W. 1055.]

PROXIMATE CAUSE.—Responsible Causation, as applied in the law, is not dependent on time, distance, or a mere succession of events. If an injury is inflicted by an event, and it is found that it has set in motion all the succeeding agencies sharing in the result, then such event, as the efficient producing cause of the injury, is held to be the proximate cause of the injury. (pp. 1001, 1002.)

ACCIDENT INSURANCE—Proximate Cause of Death.—A death results "proximately and solely from accidental cause," within the meaning of these words as used in an accident insurance policy, where the assured accidentally fell, sustained an abrasion of the skin through which bacteria entered, causing blood poisoning, from which he died. (p. 1002.)

ACCIDENT INSURANCE—Blood Poisoning.—An accident policy exempting from liability and injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not exempt the insurer from liability where the assured accidentally falls, sustaining an abrasion of the skin, through which bacteria enter, causing blood poisoning, from which he dies. (pp. 1002, 1003.)

ACCIDENT INSURANCE—Bodily Infirmary.—An exemption in an accident policy from liability for death "resulting either directly or indirectly, wholly or in part, from bodily infirmity or disease of any kind," does not exempt the insurer where the infirmity or disease results from an accident, as when the insured accidentally falls, sustains an abrasion of the skin, and blood poisoning follows, which results in death. (p. 1003.)

Van Dyke & Van Dyke and J. H. Roemer, for the appellant.

J. G. Donnelly and Timlin & Glicksman, for the respondent.

SIEBECKER, J. This is an appeal from a judgment rendered upon a special verdict in favor of plaintiff for \$11,694.64 and costs in an action upon a policy of accident insurance. The defendant insured Eugene Cary against the effects of bodily injury caused solely by external, violent and accidental means, and undertook to pay the insured the sum of \$25 per week for not exceeding fifty-two weeks for a total disability for that period. Different amounts were to be paid in the event of the loss of hands or eyes, etc., or in case of permanent disability; and if death resulted from such an injury within ninety days from the date of the injury the company agreed to pay the beneficiary under the policy

the sum of \$5,000. There were special provisions regarding injuries received on railroad trains and other trains and a number of exemptions from liability. The exemptions material of consideration on this appeal are given hereafter. On Wednesday, June 3, 1903, Eugene Cary, the insured, accidentally fell while on his way to the bathroom in his house, and sustained an abrasion of the skin on his right leg, just above the ankle. The accident occurred in going down a flight of three steps in the hallway between his bedroom and the bathroom. Immediately after the accident his wife dressed the wound, which was a little bloody, with some white cloth. This dressing was renewed daily for a week, except on Sunday, and on one occasion she applied vaseline to it. On Friday she noticed that the wound had changed somewhat in its appearance. It had become red in color. On the second Wednesday, one week after the accident and two days before his death, a physician first saw the wound, and he found that Mr. Cary was suffering from blood poisoning. Two days later, which was nine days after the accident, Mr. Cary died. On July 2, 1903, plaintiff gave notice of the claim, alleging that Mr. Cary, in "descending the steps leading to the bathroom, slipped and fell, injuring his right leg. Inflammation set in, owing to infection of the wound, which resulted in his death on June 12, 1903." On August 15, 1903, a post-mortem examination was made by physicians representing both the plaintiff and the defendant, and subsequently parts of the body were microscopically examined. Upon the trial of the action all the medical experts agreed that Mr. Cary died from the disease of septemia or blood poisoning, resulting from the introduction of bacteria into his body through this wound. Plaintiff avers that death resulted solely and proximately from the accidental fall, which produced the abrasion of the skin on the leg of the deceased. Defendant denies that death so resulted, and asserts that death resulted from causes under which the policy exempts it from liability, and claims that death resulted either from poison or infection or something accidentally or otherwise taken or absorbed, or that death resulted directly or indirectly, wholly or in part, from causes or conditions of bodily infirmity or disease. The provisions of the policy under which these exemptions are claimed are as follows:

"(1) This insurance does not cover . . . any case of disability or death whatever, except where the claimant shall

furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes; (2) nor injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; (3) nor death . . . nor disability resulting either directly or indirectly, wholly or in part, from any of the following acts, causes, or conditions: . . . Bodily infirmity or disease of any kind."

The cause was submitted to a jury, which by special verdict found the following facts:

"(1) Did Eugene Cary, by a fall in or near his bathroom, sustain an injury to his right leg on June 3, 1903, causing an abrasion of the skin on said leg? Answer. Yes.

"(2) If you answer the first question 'Yes,' then answer this question: Did the bacteria causing septemia, or blood poisoning, enter into the system of Eugene Cary through such abrasion of the skin? A. Yes.

"(3) Did Eugene Cary at the time of his ⁷⁰ death have a varicose ulcer on the upper part of the lower third of his right leg? A. No.

"(4) If you answer the question 'Yes,' then answer this question: Did the bacteria causing septemia, or blood poisoning, enter into the system of Eugene Cary through such varicose ulcer? A. [No Answer.]

"(5) Did the death of Eugene Cary result proximately and solely from bodily injury caused by external, violent and accidental means? A. Yes.

"(6) Was there any such diseased condition of either the kidneys, the liver, or the veins of the right leg of Eugene Cary as contributed to cause his death? A. No.

"(7) Was the immediate cause of the death of Eugene Cary infection from bacteria, producing the septemia aforesaid? A. Yes.

"(8) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess her damages? - A. (By the court by consent of counsel.) \$11,269.64; one year and five months' interest, six per cent, \$425.00—\$11,694.64."

The court refused to direct a verdict for defendant and also denied a motion for a new trial. This is an appeal from a judgment entered in favor of plaintiff upon the special verdict.

The defendant insured Eugene Cary for the term prescribed in the policy "against the effects of bodily injury caused solely by external, violent and accidental means," in the sums and upon the conditions specified, and among other things agreed that, "if death shall result from such injury within ninety (90) days from the date thereof, the said company will pay the sum of \$5,000" to the beneficiaries designated in the policy. There is no controversy but that Mr. Cary sustained an injury to his right leg, which⁷¹ caused an abrasion of the skin, that bacteria, causing septemia, or blood poisoning, entered his system through such abrasion, and that his death resulted therefrom; but there is a wide divergence between the claims of the parties as to what was the proximate cause of Mr. Cary's death under the established facts in the case. One provision of the contract is: "This insurance does not cover . . . any case of disability or death whatever, except where the claimant shall furnish to the company direct and positive proof that such disability or death resulted proximately and solely from accidental causes." The jury found specifically that Mr. Cary's death resulted "proximately and solely from bodily injury caused solely by external, violent and accidental means." This finding is assailed upon the ground that it is impeached by the undisputed facts established by the evidence and the findings in the special verdict. These findings are, in effect, that bacteria, causing septemia or blood poisoning, entered Mr. Cary's system through the abrasion of the skin caused by Mr. Cary's accidental fall, and that his death was immediately caused by the septemia produced from the infection by such bacteria. This contention involves the inquiry as to what is meant under the law of insurance by the proximate cause as applied and used by the parties to the contract. The term "proximate cause" as here employed must be understood to have been used by the parties to the contract in its common and accepted meaning, as adopted and approved in the law under like conditions and circumstances. While attempts to define it are numerous and the phraseology employed in these attempts differs in the use of terms, they all aim to express a certain and definite meaning, which has been observed and applied on many occasions in the decisions of this court. The proximate relation of cause and effect, establishing legal responsibility, implies that the result produced had its inception in some responsible agency. The difficulty lies in as-

certaining the agency to which the result is legally attributable. As ⁷² stated by this court, the proximate cause "is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result": *Deisenrieter v. Kraus-Merkel M. Co.*, 97 Wis. 279, 288, 72 N. W. 735. To determine it we must ascertain the cause which from its inception acts in a continuous sequence and produces the injury as a natural and probable result. It cannot be ascertained by any specific and direct test, but must be determined as any ultimate fact is inferred from evidentiary facts. If different agencies share in producing a result, it then becomes necessary to determine which is the responsible and efficient cause from which the injury proceeds, by tracing it to the active agency from whose inception the injury naturally follows, either directly or through other causes set in action by it: *Deisenrieter v. Kraus-Merkel M. Co.*, 97 Wis. 279, 288, 72 N. W. 735; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; 3 *Joyce on Insurance*, c. 60; 1 *Cyc.* 273.

The facts upon which the jury based their finding of the special verdict that Mr. Cary's death resulted proximately and solely from bodily injury caused solely by external, violent and accidental means are, in effect, that he accidentally fell and sustained an abrasion of the skin on his right leg, which wound appeared somewhat red and inflamed on the second day; that on the eighth day a physician first saw the wound and then found Mr. Cary to be suffering from blood poisoning; and that two days thereafter he died. The evidence also shows that the abrasion of the skin furnished the portal of entrance through which bacterial infection entered Mr. Cary's system and caused the septemia which was the immediate cause of his death. It is urged that unless the ⁷³ evidence establishes the fact that the bacterial infection occurred at the time of the bodily injury by the fall, it cannot be found that his death was proximately and solely caused by the accident. As above stated, responsible causation, as applied in the law, is not dependent on time, distance, or a mere succession of events. If an injury is inflicted by an

event, and it is found that it has set in motion all the succeeding agencies sharing in the result, then such event, as the efficient producing cause of the injury, is held to be the proximate cause of the injury. Under such circumstances the causal connection in the chain of events is shown by the dependence of each event for its action on the one preceding it, which thus form a continuous whole, with a proximate relationship established between the event which acted first through those naturally succeeding and the point of injury. Apply this test to the facts before us, and it is shown that no such bacterial infection would in all probability have occurred had there been no abrasion of the skin. This leads to the inevitable inference that the bacterial infection and the resultant septemia were in the natural course of events dependent upon and set in motion by the abrasion of the skin caused by the fall. The entry of bacteria into the system cannot be considered as an independent cause and as having intervened between the accidental fall and the death because of the fact that it was conditioned on the existence of the abrasion of the skin and was wholly incidental to and set in motion by it, thus making it one of the events in the chain of causation. We are satisfied that the jury were well warranted in their conclusion that Mr. Cary's death resulted proximately and solely from his accidental falling on the floor.

The policy exempted the defendant from any liability for any injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled." Exemption from liability is claimed ⁷⁴ under this provision, under the jury's finding that "the immediate cause of the death of Eugene Cary [was] infection from bacteria producing the septemia." This provision of the policy exempts defendant from liability in case Mr. Cary's death was caused by poison or infection. Nothing further need be said to refute the idea that bacterial infection proximately caused his death under the terms of the policy. This provision of the policy is an exemption from liability only where the resultant injury was proximately caused in the manner specified in the provision. We have shown that the infection which produced the septemia, which the jury found was the "immediate cause" of death, cannot be held to be its proximate cause, and therefore it does not come within the terms of this exemption. Since the

verdict negatives any claim that death was produced by poison or from anything "accidentally or otherwise taken, administered, absorbed, or inhaled," we need not further consider this exception. In so far as there was a conflict in the evidence on this question it has been resolved in plaintiff's favor by the jury.

Another exemption agreed upon by the parties is that defendant should not be liable for death "resulting, either directly or indirectly, wholly or in part, from . . . bodily infirmity or disease of any kind." The facts as found exclude the idea that Mr. Cary was afflicted with any bodily infirmity or disease other than septemia induced by bacterial infection entering through the abrasion of the skin. The exemption manifestly cannot apply to this bodily infirmity or disease, the result of the accident; for, if it were treated as within the exemption, then it would be difficult to conceive of liability under any circumstances under insurance against effects of bodily injury caused solely by external, violent and accidental means. In the very nature of things injury resulting from such an accident must be accompanied by some bodily infirmity in the general sense, and probably by disease in some form and degree, which in some measure contribute to ⁷⁵ the resulting disability or death. The utterance of the court in the recent case of *White v. Standard etc. Acc. Ins. Co. (Minn.)*, 103 N. W. 735, speaking on this subject, aptly states the rule applicable to this condition of the policy: "If, however, the injury be the cause of the infirmity or disease—if the disease results and springs from the injury—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists."

The facts of this case justify the conclusion that Mr. Cary's death resulted from the injury he accidentally received, and defendant is liable within the intent and meaning of the provision of the policy: 1 Cyc. 261; *Hall v. American M. Acc. Assn.*, 86 Wis. 518, 57 N. W. 366; *Freeman v. Mercantile*

Mut. Acc. Assn., 156 Mass. 351, 30 N. E. 1013; Manufacturers' Acc. Ind. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581; Western Com. Trav. Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223; United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. Rep. 755. The court properly awarded judgment on the special verdict.

By the COURT. Judgment affirmed.

A Policy of Insurance against death by external violence and accidental means covers the case of one who accidentally cuts his finger by the breaking of a bottle from which wound blood poisoning ensues, and death results: Central Accident Ins. Co. v. Rembe, 220 Ill. 151, 110 Am. St. Rep. 235. See, too, Jones v. Casualty Co., 140 N. C. 262, 111 Am. St. Rep. 843.

An Accidental Policy insuring loss of business time resulting from bodily injuries effected through external, violent and accidental means, covers loss of business time from disease, if the disease is caused proximately by a bodily injury occasioned through external, violent and accidental means: Aetna Life Ins. Co. v. Fitzgerald, 165 Ind. 817, 112 Am. St. Rep. 232.

SUFFEL v. MCCARTNEY NATIONAL BANK.

[127 Wis. 208, 106 N. W. 837.]

BANKRUPTCY—Preferential Payment, What not.—When a creditor receives payment without reasonable cause to believe his debtor insolvent, or that he intended to give a preference, although the facts in the possession of the creditor are such as would naturally produce in the mind of a reasonably intelligent man a doubt or raise a suspicion of solvency, and such as would put a reasonably prudent man upon inquiry, the payment is not preferential. (p. 1007.)

BANKRUPTCY—Preferential Payment—Belief of Creditor.—To have reasonable cause to believe that a trader or merchant is unable to pay his debts as they become due in the ordinary course of business is a very different thing from having reasonable cause to believe that the aggregate amount of the debtor's available property and assets is insufficient in amount, at a fair valuation, to pay his debts. (p. 1009.)

BANKRUPTCY—Preferential Payment—Question of Fact.—Whether a creditor in receiving a payment had reasonable ground to believe that a preference was intended is a question of fact determinable by the jury or trial court. (pp. 1009, 1010.)

John A. Kittel and Samuel H. Cady, for the appellant.

C. W. Lomas, for the respondent.

209 CASSODAY, J. May 7, 1902, Charles F. Dickinson was adjudged a bankrupt, and the plaintiff was thereupon appointed trustee of his estate and qualified as such. July 3, 1902, the plaintiff, as such trustee, commenced this action to recover \$1,350 alleged to have been paid to the defendant by Dickinson April 5, 1902, as a fraudulent preference. The defendant answered by way of admissions, denials and counter allegations, among others to the effect that up to the time of such bankruptcy proceedings, May 7, 1902, the defendant and all its officers believed said Dickinson to be solvent and able to pay all his debts, and had no reason to believe otherwise, and that such payment by Dickinson to the defendant was received by this defendant in good faith and in the ordinary course of business and without any intention of securing a preference over his other creditors. A trial by jury having been waived and trial had, the court at the close thereof found as matters of fact: (1) That at the time Dickinson paid to the defendant the sums alleged in the complaint and admitted in the answer he was insolvent; (2) that the amount so paid by the defendant was a greater percentage on Dickinson's indebtedness than his estate will pay to other creditors, and was a preference; (3) that the cashier of the defendant bank, who transacted its business in regard to said debt and payment, did not, at the time of the payment, believe Dickinson to be insolvent, and none of the officers of the defendant bank then believed him insolvent; (4) that neither the cashier of the bank nor any of its officers, at the time said payment was made, had reasonable cause to believe Dickinson insolvent nor that it was intended by said payment to give preference to the defendant; (5) that the facts known to the cashier of the defendant bank, at the time of said payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of Dickinson's solvency, and were such as would put a reasonably prudent man upon inquiry, if the bankrupt law required the same diligence of creditors concerning ²¹⁰ preferential payments that is required of grantees in cases of fraudulent conveyances. And as conclusions of law the court found that the plaintiff is not entitled to recover in this action, and that the defendant is entitled to judgment dismissing the complaint upon its merits, and for costs. From the judgment entered in favor of the defendant in accordance with such findings, and for costs, the plaintiff appeals.

In reaching the conclusions mentioned in the foregoing statement the trial judge, in a lengthy and carefully prepared opinion, reviewed the evidence as to Dickinson's dealings with the bank during the three years immediately preceding such payment, and all facts tending to show what knowledge the cashier of the defendant, and its other officers, had acquired during those three years as to Dickinson's financial circumstances. It does not appear that Dickinson did business with any other bank during the three years mentioned. It appears from such summary, among other things, that Dickinson's business was selling musical instruments on long time, payable in installments, secured by leases on the instruments sold; and that such business required a considerable capital in proportion to the volume of business, and so he obtained loans from the bank, giving such leases as collateral. As early as in 1899, the cashier of the bank was induced by Dickinson to believe that his father in law, who was a man of means and had done considerable for his two sons, had also advanced, as a gift to Dickinson's wife, \$1,700. January 1, 1900, Dickinson submitted to the bank a statement showing his assets to be \$8,003.86 and liabilities \$2,791; and in January, 1901, he referred to the same statement as still showing his financial condition. In May, 1901, Dickinson borrowed from the bank \$1,200, giving notes therefor with his father in law as joint maker; and he then told the cashier²¹¹ that he wanted that amount to pay off all his indebtedness aside from what he owed the bank. The notes were not paid at maturity, but, as they were considered perfectly good, they were allowed to remain. January 1, 1902, Dickinson gave the bank an inventory of his stock, and a statement of his liabilities as being \$2,000 aside from what he owed the bank. In the latter part of that month his entire stock of goods was destroyed by fire, and a few days later his household effects were destroyed by fire, but he held policies of insurance upon his stock of goods to the amount of \$4,750, of which \$3,250 was in companies represented by the defendant's cashier as agent, and \$1,000 on his household effects, of which \$500 was in a company then represented by the defendant's cashier, and the bank then held leases, as collateral, to the amount of \$900, and, from what Dickinson told him, the cashier supposed he had quite an amount of other leases. About that time the cashier learned that he owed other indebtedness to the amount of at least \$2,000, and that about

March 29, 1902, some small claims were being pressed for payment, and some of his checks were unpaid for want of funds. Sometime between the fires and March 29, 1902, the cashier inquired of Dickinson whether he intended to resume business and was told by Dickinson that he had about arranged with his creditors to pay them fifty per cent of the amount due them at once, and that they would give him time to pay the balance. About March 29, 1902, the fire losses were adjusted and paid. The bank's claim against Dickinson was secured by notes on which his father in law was joint maker and regarded as perfectly good. Nevertheless the cashier asked Dickinson to take up the notes with the insurance money, but did not insist on such payment. Dickinson, however, offered to make payment, and so the same was paid April 5, 1902, as stated.

Such is a general outline of the evidence upon which the court, among other things, found, in effect, that at the time of making such payment neither the defendant's cashier nor any ²¹² of its officers believed Dickinson to be insolvent, nor had they or any of them, at that time, reasonable cause to believe him to be insolvent, nor that it was intended by said payment to give preference to the defendant. Such findings seem to have covered the issues in the case, and determined the same in favor of the defendant. But the court went further and found, in effect, that the facts known to the cashier, at the time of such payment, were such as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of Dickinson's solvency, and were such as would put a reasonably prudent man upon inquiry, if the bankrupt law required the same diligence of creditors concerning preferential payments that is required of grantees in cases of fraudulent conveyances. The obvious meaning of this language, when construed in connection with the other findings mentioned, is that the court held, as a matter of law, that the present bankrupt act does not require the same diligence of creditors concerning preferential payments that is required of grantees in cases of fraudulent conveyances; and hence, that the facts known to the cashier at the time of receiving the payment, though sufficient to produce in his mind a doubt or suspicion of Dickinson's solvency, yet that they were insufficient to prove that the cashier had at the time reasonable cause to believe that Dickinson was then insolvent, or that in making such payment he intended to give a pref-

erence to the defendant. This is in harmony with the conclusion of the lengthy opinion of the trial judge, where he said, in effect, that the point to be decided was somewhat difficult, but a considerable reflection had led him to the conclusion that the knowledge of facts and circumstances possessed by the cashier was well calculated to produce a doubt or raise a suspicion in the mind of an ordinarily intelligent man as to Dickinson's solvency, but not such as was calculated to produce a belief of it; and as that was essential to the plaintiff's cause of action, he could not recover. Such findings of fact seem to be sustained by the evidence.

²¹³ Are the conclusions of the trial court in accordance with the law applicable to the case? It was held by the supreme court of the United States under the bankrupt act of 1867: "In order to invalidate, as a fraudulent preference within the meaning of the bankrupt act, a security taken for a debt, the creditor must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency": *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. ed. 971.

Mr. Justice Bradley, speaking for the whole court, there said: "Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

That case and that language were expressly sanctioned in *Barbour v. Priest*, 103 U. S. 293, 26 L. ed. 478. The same is true of a still later case where it was held: "A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or take security without necessarily violating the bankrupt law. When such creditor is unwilling to trust the debtor further, or feels anxious about his claim, the obtaining additional security or the receiving payment of the debt is not prohibited, if the belief which the act requires is wanting": *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 2 Sup. Ct. Rep. 219, 27 L. ed. 640.

In considering the adjudications under the bankrupt act of March 2, 1867 (14 U. S. Stats. at Large, 517, c. 176), it should be observed that the words "insolvent" and "insolvency"

contained in sections 35 and 39 of that act (14 U. S. Stats. at Large, 534, 536) had a very different meaning than they have under the present bankrupt act. Thus it was held early under the bankrupt act of 1867: "By insolvency, as used in the bankrupt act when applied to traders and merchants, is meant inability of a party to pay ²¹⁴ his debts, as they become due, in the ordinary course of business": *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504.

The present bankrupt act declares: "(15) A person shall be deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts": Act July 1, 1898, c. 541; 30 U. S. Stats. at Large, 544, sec. 1 (15); 2 Supp. U. S. Rev. Stats. (U. S. Comp. Stats. 1901, p. 3419).

To have reasonable cause to believe that a trader or merchant is unable to pay his debts as they become due in the ordinary course of business is a very different thing than to have reasonable cause to believe that the aggregate amount of the debtor's available property and assets is insufficient in amount, at a fair valuation, to pay his debts. This distinction is pointed out by Federal Judge Lowell of Massachusetts in a very recent case, where it was held: "Grounds for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent within the definition of insolvency contained in" the present bankrupt act "so as to require the creditor to surrender payments received as preferences": *In re Pettingill & Co.*, 135 Fed. 218.

It is there said by the court: "Grounds for reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property at a fair valuation is not sufficient to pay his debts."

In construing the clause of the bankrupt act here in question (30 U. S. Stats. at Large, 562, sec. 60b [U. S. Comp. Stats. 1901, p. 3445]), it has been held by the circuit court of appeals of this circuit, in an opinion by Judge Jenkins:

²¹⁵ "In determining whether taking of security by a creditor constitutes an illegal preference . . . the creditor is not

to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the fact which such inquiry should reasonably be expected to disclose": In re Eggert, 98 Fed. 843, 102 Fed. 735, 43 C. C. A. 1.

That case was cited with approval by this court in the recent case of Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 485, 104 N. W. 98. As held in that case and the Eggert case (98 Fed. 843, 102 Fed. 735, 43 C. C. A. 1), the question whether in receiving the payment the defendant's cashier had reasonable cause to believe that a preference was intended was a question of fact determinable by the jury or trial court: Kaufman v. Treadway, 195 U. S. 271, 25 Sup. Ct. Rep. 33, 49 L. ed. 190. We find no error in the record.

By the COURT. The judgment of the circuit court is affirmed.

For Recent Authorities bearing upon the decision in the principal case, see Thompson v. Fairbanks, 75 Vt. 361, 104 Am. St. Rep. 899.

BOWE v. GAGE.

[127 Wis. 245, 106 N. W. 1074.]

BROKER—When Earns Commission.—If the owner of land agrees to pay a broker a percentage of the price for which the property shall be sold to any purchaser produced by him, the broker earns his commission if he produces a customer to whom the principal in fact sells. (p. 1013.)

BROKER—Fraudulent Settlement by Principal.—If the owner of land agrees to pay a broker a percentage of the selling price for which the property shall be sold to any purchaser produced by him, and subsequently the principal represents that he has decided to keep the land, and induces the broker to accept a small sum in full for his services, whereupon the principal himself sells to a customer previously introduced by the broker, the broker, when he sues for his

commission, is entitled to retain the amount paid, subject only to an equity in favor of the principal that, if the broker shows himself entitled to recover by reason of a performance of his contract, such payment shall be applied thereon. If this application is offered by the complaint, and made by the judgment, this is in practical effect a return of the money. (p. 1014.)

REPUDIATION OF SETTLEMENT.—The Whole Doctrine of Refund upon repudiation of a contract of settlement is not technical, but equitable, and requires merely that the practical rights of the other party shall not thereby be prejudiced; that he shall be no worse off than if he had never made the contract of settlement. Under this principle, application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements. (p. 1014.)

FRAUD—Sufficiency of Evidence.—An instruction as to the quantum and character of evidence necessary to warrant a finding of fraud inducing a settlement, merely cautioning the jury that they are to find fraud only if they are "satisfied by a preponderance of the evidence" that it occurred, in the face of a request for a further instruction that, notwithstanding a mere preponderance of evidence, the finding of fraud is not to be made unless the jury are satisfied by evidence that is clear, satisfactory and convincing, is erroneous, for it is only upon evidence that is clear and satisfactory that an affirmative finding of fraud can properly be made. (pp. 1014, 1015.)

TRIAL—Reading Law Books to Jury.—The practice of counsel to request and of trial judges to read to juries passages from opinions is unwise, and usually improper if it goes beyond a mere statement of a rule of law. (p. 1015.)

BROKER—Instruction in Action for Commission.—In an action by a real estate broker to recover his commission, an instruction that "where a sale is effected through the efforts of a real estate agent or through information derived from him so that he may be said to be the procuring cause, his services are regarded in law as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of his commission rather than the contrary," is erroneous, as suggesting that real estate agents are more meritorious or entitled to more favor than people in other walks of life. (pp. 1015, 1016.)

DECEIT.—In an Action for Deceit the Sole Question is whether the misrepresentations in fact deceived the party involved and materially affected his conduct. There is no issue whether or not the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence. The effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another. (p. 1016.)

Doyle & Hardgrove, for the appellants.

Duffy & McCrory, for the respondents.

247 DODGE, J. The defendants, being interested in a farm in Fond du Lac county, entered into an agreement with the plaintiffs, real estate agents, to the effect, as found by the jury, that, if plaintiffs should effect a sale or procure a pur-

chaser at a price acceptable to the defendants, the latter would pay plaintiffs a two per cent commission on the price obtained. Eighteen thousand dollars was stated as the price which defendants desired or demanded. Plaintiffs made various exertions to make sale, reported several offers which were unsatisfactory, and at length, about January 28, 1903, obtained and communicated offer from one Ferber of seventeen thousand dollars, which was rejected by defendants as inadequate, and negotiations by plaintiffs continued. On February 20, 1903, defendant Gage came to plaintiffs and stated to them that he had bought the farm from the other co-owners and that they felt like paying the plaintiffs something, although they had not earned their commission according to contract. Plaintiffs responded that they were still hopeful of effecting a sale to Ferber at a satisfactory price; whereupon Gage, as found by the jury, repeated to ²⁴⁸ plaintiffs that he had decided and intended to keep the farm as a home for himself and not to sell it; that it was no longer in the market; whereupon the plaintiffs said that, if he had so decided, they would forego any claim to continue efforts and find and effect a sale, and accepted his offer to pay them twenty-five dollars for what they had done, and gave a receipt in full for all their services in that connection. At the moment of such negotiation defendant Gage had not determined or decided to withdraw said farm from the market or to keep it, but was on his way to see the same man Ferber with the then present intent to sell to him if a satisfactory price could be obtained. The following day he did effect such sale for seventeen thousand three hundred and fifty-six dollars, upon learning which the plaintiffs demanded payment of their commission of two per cent on that amount, less the twenty-five dollars received by them, which they credited thereon; that being refused, they brought this action to recover that amount. A special verdict was found, substantially to the foregoing effect, whereupon judgment was entered in favor of the plaintiffs for three hundred and sixty-five dollars and thirty-eight cents and costs, from which defendants appeal.

1. The sufficiency of the complaint to state a cause of action is assailed. Appellants' argument upon this subject, as also upon sufficiency of the proofs, is pervaded by an assumption that the agreement was to pay commission only in

case plaintiffs found a customer ready and willing to pay eighteen thousand dollars. Such assumption is not supported by the complaint and is negated by the verdict. The one alleges, and the latter finds, a contract to pay plaintiffs for their services in endeavoring to effect sale two per cent of the price for which the farm should be sold to any customer produced by them. This is substantially the contract dealt with in *Stewart v. Mather*, 32 Wis. 344, where it was held that the broker earns his commissions if he produces a purchaser to whom the principal in fact sells: *Willey v. Rutherford*, 108 Wis. 35, 84 N. W. 14; *Terry v. Reynolds*, 111 Wis. 122, 86 N. W. 557; *Everett Co. v. Cumberland Glass Mfg. Co.*, 112 Wis. 544, 88 N. W. 597. We may also say in this connection that we find evidence tending to prove the making of such contract, as also the production of the purchaser to whom the sale was made; hence there was no ground for nonsuit or direction of verdict on that theory, as also contended by appellants.

Appellants also urge in support alike of demurrer ore tenus and motions for nonsuit and direction of verdict, that the accord and satisfaction is not impeached, first, because no misrepresentations of any existing facts are alleged or proved, and, second, because no return of the twenty-five dollars paid on said settlement was ever made or tendered. In discussing the first ground appellants seek to treat Gage's declarations to plaintiffs that he had decided to keep the farm and not to sell it as a mere promise now sought to be added to the written agreement then made. This is a misconception. It was the statement of an existing fact, albeit depending on defendants' mental state. If they had in fact withdrawn the property from sale, as they had right to do, all prospect for earning commission as result of the work plaintiffs had already done was at an end, and the latter would naturally be induced to accept anything they could obtain and release defendants from the mere moral obligation resting upon them. The complaint alleges and the verdict finds representation of such an existing mental determination. By undisputed evidence it is shown that it did not exist, but, on the contrary, Gage then had the present intention to proceed at once to efforts to sell to the very customer brought to his notice by plaintiffs. We cannot doubt that false representation of an existing material fact was alleged and supported by some evidence.

Upon the question whether the conceded failure to either ²⁵⁰ return or tender back the twenty-five dollars paid precluded plaintiffs from denying the validity of the settlement on the ground of fraud, the decisions of this court leave little doubt, especially when set up by way of defense: *Leslie v. Keepers*, 68 Wis. 123, 31 N. W. 486; *Davis & Rankin Bldg. & Mfg. Co. v. Riverside B. & C. Co.*, 84 Wis. 262, 54 N. W. 506; *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183, 73 N. W. 784; *Gay v. D. M. Osborne & Co.*, 102 Wis. 641, 78 N. W. 1079; *Bostwick v. Mut. Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924. The settlement was, in any event, valid and binding upon defendants, so that plaintiffs were entitled to retain the money, subject only to an equity in favor of defendants that, if plaintiffs showed themselves entitled to payment according to the terms of the contract of employment by reason of completed performance thereof, such payment should be applied thereon since it has been paid as compensation for part of the same services. Such application was offered by the complaint and made by the judgment. This was in practical effect a return of the money to the defendants, for it was applied, to their benefit, upon a debt which the jury has found that they owed. This entirely satisfied the rule of the above decisions holding that the whole doctrine of refund upon repudiation of a contract of settlement is not technical, but equitable, and requires merely that the practical rights of the other party shall not thereby be prejudiced; that he shall be no worse off than if he had never made the contract of settlement. Under this principle, application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements.

2. Error is assigned upon the rule of law adopted by the court and communicated to the jury as to the quantum and character of evidence necessary to warrant a finding of fraud, inducing the settlement and receipt. The charge merely cautioned the jury that they were to find such fraud only if they ²⁵¹ were "satisfied by a preponderance of the evidence" that it occurred; and this, too, in face of a request for further instruction that, notwithstanding a mere preponderance of evidence, the finding of fraud should not be made unless the jury were satisfied by evidence that is clear, satisfactory, and convincing. It is well settled that certain facts, including fraud, mistake, and the like, are not to be found as readily as

the affirmative of ordinary issues not involving turpitude, or the repudiation of deliberate and formal writings, and while the doctrine earlier declared, that the evidence must establish such facts beyond reasonable doubt, has been abandoned, it is held that only upon evidence that is clear and satisfactory can an affirmative finding of fraud properly be made. A court, in submitting the issue of fraud to a jury, does not perform its duty without instruction marking this distinction: *Parker v. Hull*, 71 Wis. 368, 5 Am. St. Rep. 224, 37 N. W. 351; *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188; *Klipstein v. Raschein*, 117 Wis. 248, 94 N. W. 63; *Richmond v. Smith*, 117 Wis. 190, 94 N. W. 35; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. The instruction given would correctly enough have defined the jury's duty upon an ordinary issue of fact (*Anderson v. Chicago B. Co.*, 127 Wis. 273, 106 N. W. 1077); but it was incomplete as a guide in passing upon fraud, and the failure to add the proper qualification when requested so to do must be held error.

3. Error is assigned upon an instruction upon the question relating to the terms of the employment: "I will instruct you further in connection with this question that where a sale is effected through the efforts of a real estate agent or through information derived from him so that he may be said to be the procuring cause, his services are regarded in law as highly meritorious and beneficial and the law leans to that construction which will best secure the payment of his commission rather than the contrary."

²⁵² This is a quotation of a somewhat rhetorical and argumentative statement by Dixon, C. J., of not alone a rule of law, but reasons therefor, in *Stewart v. Mather*, 32 Wis. 344, 350. It is an apt illustration of a tendency in counsel to request, and in trial judges to read to juries, passages from opinions which it is hoped will convey a favorable impression. The practice is unwise and usually improper if it goes beyond a mere statement of a rule of law. The duty of the trial court is performed when he communicates the rule which should guide the jury without stating the reasons which support it, or quoting comments approving or derogatory to those who obey or infringe. It was improper to suggest to the jury in this case that real estate agents are more meritorious or entitled to any more favor than people in other walks of life. Yet such must be the effect of the instruction now under crit-

icism. For no other reason was it suggested to the trial court. At most, it was proper to inform the jury that if the contract, as they found it to have been expressed between the parties, was ambiguous, they should favor a construction which would justify an affirmative answer to the second question of the special verdict, namely, whether the agreement was to pay commission upon procurement of a customer at an acceptable price. Even that would not be proper unless the construction of the contract was open to the jury by reason of ambiguity in language or conflict of evidence as to extrinsic facts tending to elucidate the meaning of the parties: *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812. Where the jury had only to decide whether one set of words or another were in fact used, neither being ambiguous, such an instruction as this would be highly misleading. No rule of law confers higher credibility on a real estate agent, as such, than upon others.

Error is assigned upon refusal to submit in the special verdict three questions requested. The first and second were properly refused, because of entire absence of conflict in the evidence upon their subjects. The third inquired whether ²⁵³ the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence. There is no such issue in an action for deceit. The sole question is whether the misrepresentations in fact deceived the party involved and materially affected his conduct. Effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another: *Barndt v. Frederick*, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199; *Kaiser v. Nummerdor*, 120 Wis. 234, 97 N. W. 932.

Some errors are assigned, but we cannot discover that discussion of them can be useful upon the retrial.

By the COURT. Judgment reversed, and cause remanded for new trial.

A Broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer, provided a customer is not found: *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397, and see the cases cited in the cross-reference note thereto. However, if he introduces a buyer to whom a sale is made, he earns his commission although the principal himself consummates the sale: See the notes to *Kelley v. Baker*, 26 Am. St. Rep. 547; *Ward v. Cobb*, 12 Am. St. Rep. 690; *Walker v. Osgood*, 93 Am. Dec. 176. But see *Cadigan v. Crabtree*, 186 Mass. 7, 104 Am. St. Rep. 543.

MARLING v. NOMMENSEN.

[127 Wis. 363, 106 N. W. 844.]

BILLS AND NOTES—Payment to Unauthorized Person.—The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper, independently of the existence of any mortgage or other security. (p. 1019.)

RECORDS.—A Statute Declaring Void Any Unrecorded Conveyance as against a subsequent purchaser whose conveyance shall first be duly recorded does not exclude all other adverse effect than that which it denounces against one who neglects to place his conveyance on record. (p. 1020.)

ESTOPPEL IN FAIS.—The General Doctrine is that he who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other. (p. 1021.)

RECORDS—Effect of Omission to Record Instrument.—Since the adoption of the system of public registry of conveyances, the custom of prompt registration has been so nearly universal that omissions may well be considered neglect of those precautions customarily taken to assert a grantee's rights in the land, and people generally have become accustomed to believe that all rights will so appear and to act confidently on that assumption; hence such conduct is to be expected by one holding an unrecorded conveyance. (pp. 1021, 1022.)

RECORD—Omission to Record Assignment of Mortgage.—If the assignee of a mortgage fails to record the assignment, knowing that the mortgaged land was held by a real estate dealer with consequent likelihood of sale, he thereby negligently places it in the power of the mortgagee to deceive or mislead a purchaser, who, by law and custom, would have the right to rely on the record. Withholding the assignment from record is a persistent declaration to all persons dealing merely with the title to the realty that the mortgagee owns the debt. (p. 1022.)

RECORD—Failure to Record Assignment of Mortgage.—If the assignee of a mortgage, knowing the property is in the hands of a real estate dealer and therefore likely to be sold, withholds the assignment from record, he is estopped to assert the mortgage as against a vendee of the land who purchases in good faith and in reliance on his attorneys' examination of the abstract showing only the mortgage, the discharge of which by the mortgagee is at the same time delivered, with the assurance that the note would be surrendered in a few days. (pp. 1022, 1023.)

Lenicheck, Fairchild & Boesel, for the appellant.

Turner, Hunter, Pease & Turner, for the respondent.

³⁶⁵ DODGE, J. On November 3, 1897, the defendant Milwaukee Realty Company executed its negotiable note and a mortgage securing the same upon certain premises in Milwaukee to Henry Herman. Said note was guaranteed by the defendants Agnew and Maynard. On December 10, 1897, Herman duly transferred said note and mortgage to the plaintiff, delivering the same to her with a written assignment, which she thereafter always retained, but did not record the assignment until April 17, 1903. On July 5, 1902, the Milwaukee Realty Company agreed on a sale of said property to the appellant. She paid ten dollars down, and received a receipt in the following words:

“July 5/02.

“Received of B. Nommensen Ten Dollars to apply on purchase of No. 180 Chambers St. (40 x 60 ft.) Total purchase price of said premises being \$2950. net. There being on said premises a mortgage of \$1800, which said Nommensen or his assigns agrees to assume as part of the purchase price of said premises. The balance of said purchase price shall be paid as follows: \$240. July 7/02, \$320. July 8/02 & \$580. August 30/02 or the said Nommensen may pay all of the balance of said purchase price, viz. \$2940. on or before ³⁶⁶ Sept. 1st/02. Land contract and abstract of title will be furnished at any time on demand, all deferred payments to bear interest at the rate of 6% per annum.

“A. D. AGNEW.”

Appellant notified the realty company of her election to pay the whole purchase price and receive a clear title to the premises, and on September 12, 1902, paid the balance then remaining, together with interest, amounting to two thousand four hundred and two dollars. Her attorney, who accompanied her, examined the abstract, and discovered the mortgage in question running to Henry Herman, and the realty company, acting by Agnew, delivered Herman's release. The attorney asked for the note and mortgage and was told that Herman would send them to Agnew within a few days, whereupon appellant could call for them. On such assurance title was accepted in reliance on the abstract and the release, a warranty deed being made by the realty company to appellant. Such release of mortgage and the deed were recorded, respectively, May 8, 1903, and July 6, 1903. The release was obtained by Agnew from Henry Herman by payment to him

of the amount of the mortgage by the Milwaukee Realty Company. He informed Agnew that he did not then have in his possession said note and mortgage, but promised to obtain them within a few days. In the spring of 1903 Herman absconded, a defaulter. Appellant has been in possession of the premises by the collection of rents ever since the purchase in July, 1902. None of the defendants had any knowledge of the transfer of the mortgage to plaintiff, nor had plaintiff any knowledge of the purchase of the premises by appellant or of the payment of the mortgage to Herman. She had never given Herman any authority to collect it. Plaintiff commenced this action to foreclose said mortgage, demanding deficiency judgment against defendants Milwaukee Realty Company, Maynard and Agnew. Appellant set up the discharge, both as a defense and as a counterclaim, with prayer for quieting her title against plaintiff. Upon ³⁶⁷ findings substantially in accordance with the facts above stated, judgment was entered in accordance with the prayer of the complaint, from which the defendant Nommensen appeals.

Appellant contends for reversal upon two theories: First, that the debt secured by plaintiff's mortgage is paid and the mortgage, therefore, discharged; and, secondly, on the ground that she is estopped to set up such mortgage against appellant, even if the debt be not paid. The first ground is fully negatived by our former decisions. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper independently of the existence of any mortgage or other security: 3 Randolph on Commercial Paper, secs. 1444, 1450; Bartel v. Brown, 104 Wis. 493, 80 N. W. 801; Kohl v. Beach, 107 Wis. 409, 81 Am. St. Rep. 849, 83 N. W. 657, 50 L. R. A. 600; Louizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; Bromley v. Lathrop, 105 Mich. 492, 63 N. W. 510; Church Assn. v. Walton, 114 Mich. 677, 72 N. W. 998; Hollinshead v. Stuart & Co., 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659; Manhattan Co. v. Reynolds, 2 Hill, 140; Mitchell v. Bristol, 10 Wend. 492; Williams v. Jackson,

107 U. S. 478, 2 Sup. Ct. Rep. 814, 27 L. ed. 529. Certain cases cited to support effectiveness of payment to original mortgagee as against unknown assignee do not deal at all with negotiable instruments, and, therefore, ³⁶⁸ are without applicability: *Van Keuren v. Corkins*, 66 N. Y. 77; *Barnes v. Long Island R. E. etc. Co.*, 88 App. Div. 83, 84 N. Y. Supp. 951. Some contention is made that appellant assumed the debt, and that the payment to Herman must be deemed to have been made by her, thus subjecting her to the principle above stated. We are clear, however, that the premise to this reasoning is incorrect. The clear meaning of the receipt given at the time of bargaining for the premises was that appellant might, at her election, buy the premises subject to the mortgage, in that case assuming the debt, or might buy clear of the mortgage upon payment of the entire sale price to the realty company. Beyond dispute she elected to do the latter and, therefore, never became liable for the debt as between herself and her grantor. We do not understand the finding that said written receipt contained words of assumption to mean that appellant agreed to assume. If that be the meaning, it would be contrary to the undisputed evidence.

Turning, then, to the second ground of defense, we must first overrule some contention in appellant's favor based on section 2241 of the Statutes of 1898, declaring void any unrecorded conveyance as against a subsequent purchaser "whose conveyance shall first be duly recorded," for the reason that appellant's conveyance, whether the release from Herman or the warranty deed from the Milwaukee Realty Company was not recorded until after plaintiff's assignment: *Fallass v. Pierce*, 30 Wis. 443; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614; *Butler v. Bank of Mazeppa*, 94 Wis. 351, 68 N. W. 998; *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 104 N. W. 997, 1 L. R. A., N. S., 1891. The real question to be considered is whether the statute above mentioned excludes all other adverse effect than that which it denounces against one who neglects to place his conveyance on record. It must be confessed that the final opinion in *Fallass v. Pierce*, 30 Wis. 443, seems to proceed very much on that assumption, and some facts which might in that case have been urged as arousing estoppel ³⁶⁹ in pais were passed over, and the earlier conveyance sustained notwithstanding. Nevertheless the subject was not

discussed, and the case is rather suggestive than decisive. In *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95, while the earlier unrecorded conveyance was sustained because the later one was not recorded, as an independent ground, the court dwelt with some industry on the presence of facts which excluded reliance by the second purchaser upon the absence of any record of prior conveyance; and in *Butler v. Bank of Mazeppa*, 94 Wis. 351, 68 N. W. 998, there is intimation that a negligent purchaser might be affected by an estoppel outside the terms of the statute. *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614, and *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924, 104 N. W. 997, 1 L. R. A., N. S., 891, both presented situations falling within the terms of the statute, the later conveyances being recorded before the earlier ones.

A moment's reflection must convince one that a prior purchaser may, by failure to record his conveyance, certainly in connection with other facts and circumstances, become estopped to rely on it against one whom he has led to believe and act upon its nonexistence, although he should afterward get his conveyance on record before the later one. Certainly, if the assignee stood by and declared his nonownership to one about to buy or pay a mortgage to the original mortgagee, he would be estopped afterward to assert his assignment. The question, therefore, is whether such acts of either omission or commission are here presented as bring plaintiff within the general doctrine of estoppel. That general doctrine is that he who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other: *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328, 78 N. W. 440; *Frels v. Little Black F. M. Ins. Co.*, 120 Wis. 590, 98 N. W. 522. The question presented, then, is whether plaintiff's act in not recording her assignment could have been anticipated by her as likely to induce ³⁷⁰ belief in others that Herman still owned it and lead them to act accordingly. Since the adoption of the system of public registry of conveyances, the custom of prompt registration has been so nearly universal that omissions may well be considered neglect of those precautions customarily taken to assert a grantee's rights in the land, and people generally have become accustomed to believe that all rights will so

appear and to act confidently on that assumption; hence such conduct is to be expected by one holding an unrecorded conveyance. The land in question was held by a dealer in real estate, so that the likelihood of its sale was apparent to plaintiff. She must realize that, in event of sale, the record advertised Herman as the person to whom a purchaser must apply, either to clear the title from the lien of the mortgage or for information as to the validity or amount of that lien, and, therefore, negligently placed it in Herman's power to deceive or mislead a purchaser, who, both by law and by custom, would have the right to rely on the record. Her withholding her assignment from record was a persistent declaration to all persons dealing merely with the title to realty that Herman owned the mortgage. Of course, as to one dealing with the debt evidenced by a negotiable note, the actual possession by her of such instrument changed the situation; but that has no application to appellant.

The efficacy of a discharge by the record holder of a mortgage in favor of one dealing with the land in reliance thereon is a subject of some conflict of authority, as stated in *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15, where cases on both sides are cited, and the rule favoring such efficacy is adopted, in which view the following decisions concur: *Swartz's Exrs. v. Leist*, 13 Ohio St. 419; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Bullock v. Pock*, 57 Neb. 781, 78 N. W. 261; *Ogle v. Turpin*, 102 Ill. 148; *Havighorst v. Bowen*, 214 Ill. 90, 73 N. E. 402; *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. Rep. 814, 27 L. ed. 529. In the recent case of *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 942, 104 N. W. 997, 1 L. R. A., N. S., 891, while the decision might have rested upon the statute, absolutely avoiding the unrecorded assignment of the mortgage, the subject of estoppel was discussed, and the concurrence of this court with the line of decisions above cited was declared. We still adhere to that view, and feel convinced that plaintiff is estopped to deny Herman's continued ownership and authority to discharge this mortgage as against a purchaser of the property in good faith relying upon the public records. We can find nothing to impugn appellant's good faith. She paid the full price for the land in reliance upon her attorney's examination of an abstract from the records showing only a mortgage to Herman, his discharge of which was

delivered at the same time. The consistency of just such acts with entire good faith is fully declared in *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 942, 104 N. W. 997, 1 L. R. A., N. S., 891, as also the immateriality of the fact that the note and mortgage were not exhibited to her. We must therefore conclude that appellant holds the land in question discharged from the lien of plaintiff's mortgage.

By the COURT. Judgment reversed, and cause remanded, with directions to enter judgment in accordance with the prayers of appellant's counterclaim, as to her, and for further proceedings according to law.

If the Assignee of a Mortgage does not record the assignment, he may be estopped to assert the mortgage as against persons without notice of the assignment: *Connecticut Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655. The record of a mortgage affords constructive notice only of its existence and ownership thereof by the mortgagee named therein, not of the assignment of such mortgage to another: *Friend v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924. A release by a mortgagee after assigning the note secured by the mortgage is valid in favor of one who had no notice of the assignment, although both the note and mortgage are in the hands of the assignee: *Swasey v. Emerson*, 168 Mass. 118, 60 Am. St. Rep. 368. See, too, *Huitink v. Thompson*, 95 Minn. 392, 111 Am. St. Rep. 476. But the record of the assignment of a mortgage imparts notice to all persons dealing with the assignor; and hence payment thereafter made to him does not ordinarily discharge the mortgage: *Cornish v. Wolverton*, 32 Mont. 598, 108 Am. St. Rep. 598.

HUBER v. MARTIN.

[127 Wis. 412, 105 N. W. 1031, 1135.]

MUTUAL INSURANCE—Termination of Membership.—Under the Charter of a Mutual Insurance company providing, in effect, that one can become a member only by taking out a policy of insurance and that the membership can survive only to the end of the policy period upon which it is based, no one can rightly be treated as a member for any purpose at any time unless he then holds an unexpired policy of insurance. (p. 1033.)

MUTUAL INSURANCE—Commencement of Membership.—If the charter of a mutual insurance company contains no provision on the subject, membership commences only with the taking out of a policy, and lasts only for the policy period. (pp. 1033, 1034.)

MUTUAL INSURANCE—Status of Members.—As regards rights and remedies, the policy-holders in a mutual insurance company are stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary. (p. 1036.)

MUTUAL INSURANCE—Interests of Members.—The interests of policy holders in a mutual insurance company are twofold: they are both insurers and insured. In respect to the former, they are bound to share in the losses and entitled to share in the profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise. (pp. 1036, 1037.)

MUTUAL INSURANCE—Title to Property.—The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members the same as in case of a stock corporation. While the corporation owns the property, the members own the corporation. (pp. 1034, 1035.)

MUTUAL INSURANCE—Creation and Distribution of Surplus.—It is competent for a mutual insurance corporation, there being no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business. (p. 1035.)

MUTUAL INSURANCE—Distribution of Surplus.—In case of a distribution of the surplus of a mutual insurance company or of its other assets, there being no charter provision to the contrary, existing policy-holders and such only are the legitimate distributees. In the aggregate, they are entitled to the whole. (p. 1036.)

MUTUAL INSURANCE—Property Rights of Members.—The Legislature may Alter or amend the charter of a corporation, but cannot legitimately appropriate its property without the consent of all its members, either to its own use or that of a private party, though such party be a successor corporation, in the absence of some authorization to the contrary in the charter originally. (p. 1038.)

MUTUAL INSURANCE—Property Rights of Members.—For all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members, whether they are stockholders in the technical sense or in the broader one which includes policy-holders in such company. (p. 1037.)

MUTUAL INSURANCE—Constitutional Rights of Members.—The property of a mutual insurance company and the equitable property rights of its members are within the guaranties of the state constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the national constitution as regards the equal protection of the laws and deprivation of property without due process of law. (p. 1042.)

MUTUAL INSURANCE—Distribution of Assets.—A law enacted during the life of a mutual insurance company providing for the distribution of its assets or a bestowal thereof upon another without consent of all of its members, no authority in that regard being contained in the charter of such company, offends against the constitutional limitations referred to. (p. 1042.)

MUTUAL INSURANCE—Suits by Members.—Any member of a mutual insurance company, suing for himself and others similarly interested, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, when its officers will not move appropriately to that end. (p. 1045.)

CORPORATIONS—Effect of Termination.—The supposed common-law rule, that upon the termination of a corporation its debts become extinguished, its realty reverts to the grantors and its personal

property goes to the sovereign, if it ever existed in fact, is wholly obsolete, except as to purely public corporations. (p. 1038.)

CONSTITUTIONAL LAW—Statute Void in Part.—In case of a scheme of legislation for a particular purpose, created by the enactment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and is unconstitutional, the whole is inefficient. The matter is governed by the rule, that where a part of a law is unconstitutional and was the inducement to the rest, which by itself would not have been enacted, the whole is void. (p. 1047.)

CORPORATION DE FACTO.—An Unconstitutional Act of the Legislature is not a sufficient basis for a corporation de facto. That can exist only in case of a law under which it might have been created de jure. (p. 1047.)

CORPORATION.—The Law That Corporate Existence cannot be Inquired Into, except by judicial proceedings in the name of the state, does not apply to a pretended but not even a de facto corporation. (p. 1047.)

MUTUAL INSURANCE—Reorganization on Stock Plan.—In case of success, in form, of an attempt to reorganize a mutual insurance company on the stock plan under a law, in terms, authorizing it, and the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and goodwill, if the attempt is fruitless because of the enabling act being void such continued business is to be regarded as really that of the old corporations; as belonging to it. (p. 1048.)

[Syllabus by Marshall, J.]

Lewis & Roach and Quarles, Spence & Quarles, for the appellants.

Sawyer & Sawyer and S. S. Barney, for the respondents.

415 MARSHALL, J. Appeal from an order sustaining demurrers to the complaint. The facts relied upon for a cause of action were these: The defendant Germantown Farmers' Mutual Insurance Company is a corporation created and existing under chapter 278 of the laws of Wisconsin for the year 1854, and the defendant Germantown Insurance Company is a corporation existing under chapter 89 of the statutes of 1898, and chapter 229 of the laws of Wisconsin for the year 1903. The individual defendants are the officers and directors of the two corporations. Plaintiff is a policy-holder of the first-named company, holding policy No. 67,198, dated August 1, 1901, and expiring by its terms August 1, 1906, and by the law of 1854 mentioned he became a member thereof. Such company has, or did have before they were dissipated, as hereafter stated, assets in excess of \$211,375.76, which are really the property of its members. September 28, 1903, the individual defendants

and others wrongfully conspired together and organized the Germantown Insurance Company, to the end that it might acquire the assets of the Germantown Farmers' Mutual Insurance Company for the use and benefit of the former and the members of such conspiracy without the consent of the policy-holder members of the old organization, and the purpose of such conspiracy was accomplished, so far as creating the new organization and putting its members in possession of such property. Such new organization has paid a small part of the assets wrongfully acquired to members of the old company. Nearly all the stock of the new organization has been taken by the officers and directors of the old company, they thereby wrongfully acquiring to themselves the large property aforesaid, which belonged to the old organization and its members, leaving said members no security for payment of their policies, except that assumed by the new organization. Plaintiff has been denied access to the books of ⁴¹⁶ the new organization, on which account he is unable to state precisely the amount of unlawful gains which it secured by the wrongful acts aforesaid. This action is prosecuted on behalf of plaintiff and all others similarly situated for the benefit of the Germantown Farmers' Mutual Insurance Company, such company being made a defendant because its officers are the persons guilty of the mischief complained of, and insist that the new organization has absorbed the old one, leaving the latter incapacitated to maintain any action.

Upon such facts plaintiff prayed for an accounting by the Germantown Insurance Company and the individual defendants as to all their doings in the premises, and for restraint upon them as to appropriating the goodwill of the Germantown Farmers' Mutual Insurance Company, or disposing of or injuring its assets, and for a receiver to take over the assets involved in the administration, and for general relief.

Separate demurrers were interposed to the complaint, first, for want of jurisdiction over the defendants or the subject of the action; second, for want of legal capacity to sue, in that plaintiff has no legal right to call in question the power of the defendant corporations or their officers to do any of the things mentioned in the complaint, and has no interest in the subject matter of the action; third, for misjoinder of causes of action; fourth, for insufficiency. The demurrers were sustained and plaintiff appealed.

⁴²¹ Counsel for the respective parties, as we view the complaint, in effect, take issue as to their rights on this state of facts: A purely mutual company was organized under a charter providing that policy-holders only should be members thereof. It conducted its business for some fifty years. In that time it accumulated a surplus of over \$200,000. At the time of the commencement of the action and during the reorganization acts hereafter mentioned, plaintiff was a member of the company. The entire membership at the time of such proceedings constituted but a small proportion of those who had joined the company from the beginning. The legislature, after the surplus was substantially as indicated, enacted a law in terms authorizing such a company to be turned into a stock corporation at the option of two-thirds of its existing policy-holders representing not less than one-half of its outstanding insurance. It did not recognize such policy-holders as having any greater several interests in the corporate property, or rights to participate in the taking of stock in the reorganized company, than past policy-holders, or treat them as being the owners of the corporate property and business, or having any interest therein worthy of being sought after in the reorganization proceedings, or as a result thereof, or policy-holders, past and present, as having, in the aggregate, rights in such property equivalent to but a small proportion of the whole thereof, or of a character reasonably probable to be realized upon. The scheme in its entirety was such that its execution in any case would probably or necessarily result in bestowing the net assets over liabilities of the company upon the new organization, and indirectly upon the promoters thereof as a mere gratuity. The officers of the Germantown Farmers' ⁴²² Mutual Insurance Company became the promoters of the Germantown Insurance Company, as a reorganization of the former, for the purpose of enabling the new creation to acquire directly, and themselves to acquire indirectly, without consideration, the surplus assets of the old company. They fully executed such purpose as regards acquiring actual possession of such property and using the same as that of the new company. The plaintiff and others similarly situated did not consent thereto.

Counsel for respondents by their attitude in printed and oral arguments accepted the situation stated, affirming that the conduct complained of is justifiable on principle and au-

thority, that it is neither a wrong to appellant or to anyone else, of sufficient dignity at least to be a subject for judicial redress at his suit or that of any other party; that it is not even one of those wrongs from the standpoint of good morals, laying one liable to the condemnation of his fellow-men; and that, if it were otherwise as an original proposition, it is not a wrong under the circumstances by force of legislative authorization within its legitimate field. Counsel for appellant as confidently assert the negative, maintaining that the acts of the legislature involved, and to which respondents point for their justification, is a clear usurpation—is within the condemnation of the letter and spirit of the constitution, state and national, and of elementary and judicial authority as well.

The very statement of the position which must be maintained in order to defeat the complaint as insufficient to show any wrongdoing as regards the appellant of which he can be judicially heard to complain in the manner attempted, or at all, at first sight, we must confess, so shocks the moral sense that one is inclined to enter upon a study of the subject with the impression that no substantial basis can be found for it in the law. As a rule, one can rightly acquire property only by gift inter partes or operation of law, or by finding or legitimate ⁴²³ reduction to possession of things belonging to the people in the sovereign capacity, or by estoppel or by adverse possession, or by creating it by one's own energy, or that in connection with his private capital, or such and the capital of others legitimately secured, or by purchase. To obtain property in any other way one must needs pass beyond the boundary line between right and wrong, measured by legal standards. It is quite probable that there have been many excursions beyond that line, and many more beyond the line dividing right from wrong, tested by purely moral standards, in the administration of insurance trusts of different sorts—some of the kind involved here and some having the stock feature of ownership—the officers, or those connected with them, with their connivance or consent, or both, in various ways depleting the trust fund or using it for their private enrichment as never contemplated by the policyholders, or the organic acts of the corporate creation. Such occurrences, whether viewed in their moral or legal aspects, as regards facility for transferring trust property to the private use of its chosen guardians, pale before, the possible

happenings, if the stated case must be stamped with judicial approval. In that contingency nothing stands in the way but the uncertain will of the legislature, of the officers of our great mutual life insurance company, if they should be so inclined, so manipulating things as in time to reduce to their private ownership the great wealth constituting its surplus fund, and reducing to like ownership the goodwill of the insurance business itself, which has been built up by wise management and the patronage of the people through a period of more than half a century. The very thought that such a result would be possible if the law is as contended for by respondents' counsel suggests the existence of such serious infirmity in our constitutional guaranties as regards property rights that one could not well conclude that they exist, except in the face of some unmistakable demonstration.

⁴²⁴ To give added emphasis to what has been said we will turn to chapter 229 of the laws of 1903, under which respondents justify, showing that the result of executing the law in the case in question would produce all the dire results to the parties in interest above suggested.

The company was organized in 1854. It had done business for forty-eight years at the time of the acts complained of. At the end of such period, as appears by the last public record, the amount of unexpired risks was \$2,922,889. The amount paid for carrying such risks was \$42,331.32. The length of the policy periods was about as follows: One-fourth one year, one-half two years, and one-fourth five years. The total amount of premium assessments paid into the company's treasury from its organization was \$896,558.64. Assuming that the average rate for carrying risks for the entire period of the company's existence was substantially the same as for the last five years thereof the total amount of risks from the beginning was approximately \$63,334,000, indicating that at the time of the attempted reorganization the number of policy-holders and the amount of risks then in force was to the total number of persons who became members of the company from the start, and the total amount of risks carried during the entire period, as one to twenty-two. The reorganization act provided as follows:

"Sec. 1. Any mutual fire insurance corporation, organized under any law of this state," circumstanced as the one in question, "may, with the consent in writing of two-thirds ($\frac{2}{3}$) of the members of such corporation representing not

less than one-half of its outstanding insurance, become a stock corporation, by proceeding in accordance with the provisions of the statutes of this state regulating the organization of stock fire insurance corporations.

"Sec. 2. Every member of such corporation on the date of said annual or special meeting shall be entitled to priority in subscribing to the capital stock of such corporation, for one month after the opening of the books of subscription, and in the proportion that the amount of cash premium paid in by ⁴²⁵ such member bears to the total amount of risks in force on the date of said annual or special meeting; provided, that if any one of the past or present members shall not subscribe for stock, then the said corporation shall, upon application, within ninety (90) days return to him his equitable proportion of the surplus of the company, to be computed by an actuary to be employed by the corporation for that purpose.

"Sec. 3. No part of the assets of such mutual fire insurance corporation shall be divided among the members thereof, but shall, after such reincorporation, become the property of such stock corporation, to be expended by it for the ordinary disbursements of the company, in carrying on its business, including the payment of losses incurred upon its policies; and all property of such mutual fire insurance corporation shall be transferred to such stock corporation, organized as aforesaid, in the manner provided by law."

It will be observed that one month only was allowed after the opening of the books for subscriptions for stock in the new corporation for members of the old company to become subscribers. That contemplated that all persons who had become members of the company during the forty-eight years of its existence, and who were living, and the personal representatives or the heirs wherever they might be, of those who were dead, should exercise the right afforded by the act to take stock in the corporation within the thirty days named. No provision, however, was made for any notice to the possible beneficiaries of the opening of such books, nor as to the amount of capital stock of the new corporation. All that was left to the custodians of the property and business of the old concern, who presumably were to be, and who in fact became, the promoters of the new organization. The complaint does not state what amount of stock was finally determined upon for the new organization. It could not have been less than

\$100,000, for that is the minimum fixed by the statute. It is safe to assume, probably, that it was fixed at that sum. So it appears by computation that every one of the existing policy-holders was afforded the opportunity, if he should desire ⁴²⁶ and discovered his rights in time, to take stock to the amount, approximately, of fifty cents for each \$1,000 of insurance carried. The rate would be substantially the same as applied to all persons who became policy-holders from the beginning. If all the existing policy-holders improved the very uncertain and wholly valueless opportunity to take stock, it would exhaust about \$1,500 thereof. If all those possessing membership rights at any time during the existence of the company improved the opportunity afforded by the act to take stock, it would exhaust about \$31,667 thereof, or somewhat less than one-third. Thus it will be seen that the promoters of the enterprise and, in contemplation of law, the members of the legislature in passing the act must have proposed from the start the appropriation for the use of such promoters of all the assets of the old company, alleged in the complaint to amount to some \$250,000, and \$211,375.76 in excess of all liabilities, actual and contingent, since the amount above secured to each policy-holder was too trifling to be called for.

The act treated, as before indicated, everyone as having a membership right who at any time held a policy in the corporation and entitled to the same consideration as any other member. Provision was made, in form, to enable each one having any such right to claim a part of the surplus, in case of his failing to take advantage of the valueless opportunity indicated, to take stock, but such provision was likewise valueless as will be seen. As a condition of any past or present member obtaining any part of the surplus he was required to be vigilant and make application therefor, and then to take such sum for his appropriate share as the company's actuary might deem equitable. Obviously, if the legislative basis for subscription rights of members were taken as the equitable standard for measuring rights to the surplus, the amount coming to each member would not be worth the trouble required to obtain it. It must be presumed that the legislature ⁴²⁷ intended to preserve to those desiring to become members of the new organization their equitable rights in that regard according to its views in respect thereto. In that light no reason is perceived why, if the company's actu-

ary saw fit to use such standard, it would not be justified, if the act of the legislature is valid. In any event, since past as well as present members are required to be considered, only about one twenty-second, or \$9,545, of the surplus could be awarded to present members, if the entire surplus were to be considered as a fund for distribution among members, past and present. That would afford about thirty-one cents per \$1,000 of risk carried by the company. Thus, it will be seen, it would be a reflection upon everyone concerned in passing the act in question and executing it, to entertain the idea that they seriously thought the result of administering it to the company in question would be otherwise than a bestowal upon the new corporation of the legal title, and upon the managing agents of the old company—the custodians of its property—who would naturally, and did actually, become the organizers of such corporation, the equitable ownership of all property and business of the old company as a mere gratuity.

If what has been said needs re-enforcement section 3 of the act furnishes it. That is sufficiently significant to bear repeating at this point: "No part of the assets of such mutual fire insurance corporation shall be divided among the members thereof, but shall, after such reincorporation, become the property of such stock corporation, to be expended by it for the ordinary disbursements of the company in carrying on its business, including the payments of losses incurred upon its policies."

How could all the property of the old organization become that of the new one, "to be expended by it for its ordinary expenses," no part being divided among the members of the old organization, and yet such members obtain their equal proportion under the second section of the act? The only ⁴²⁸ conclusion reachable, it seems, is that the author of the legislation did not give any thought to the subject of the second section as to its requiring any efficient distribution of the surplus. It could not be distributed as property of the old organization and at the same time be covered into the treasury of the new one for its ordinary disbursements in payment of its debts, expenses, and policies. So it is plain, not only from the spirit but the letter of the act, that the purpose thereof was to make a gift of the property of the old organization to the new one, the same being regarded as disposable at the will of the legislature.

In respect to the peculiar features before referred to there is no similar law anywhere, so far as we are able to discover. Counsel for respondent place great reliance on *Grobe v. Erie Co. Mut. Ins. Co.*, 24 Misc. Rep. 462, 53 N. Y. Supp. 628, affirmed, 39 App. Div. 183, 57 N. Y. Supp. 290, which will be discussed at some length hereafter. As suggested by counsel for appellant, the law there, quite unlike the one before us, dealt with existing members of the old organization as, in the aggregate, the equitable owners of its assets and entitled to become the owners of all of the stock of the new corporation. The total amount paid into the corporate treasury was deemed to stand for all the stock in the new organization. Each policy-holder was secured the right to take such proportion of the entire stock as the amount paid by him on unexpired insurance bore to the aggregate of all sums so paid by existing members: N. Y. Laws, 1896, c. 850. We venture to say that, except in the one instance before us, no law has been enacted for converting a mutual insurance company, or other nonstock organization, into a stock company, not recognizing the members of the old company as its owners and entitled to be recognized as such in the organization of the new one.

Proceeding logically, the next question to be taken up is this: Who were the members of the Germantown Farmers' ⁴²⁰ Mutual Insurance Company at the time of the attempted reorganization? The law of its creation answers that most distinctly, if effect is to be given to the plain letter thereof. Section 3, chapter 278 of the Laws of 1854 provides that "every person who shall at any time become interested in said company by insuring therein, and also his heirs, executors, administrators and assigns, continuing to be insured therein . . . shall be deemed and taken to be members thereof for and during the terms specified in their respective policies, and no longer." With language so plain it seems useless to spend time endeavoring by construction to read some idea out of it not found in its letter. Words which are plain, both in themselves and when applied to the subject with which they deal, in that they lead to no absurd consequence, must be taken according to their ordinary import, nothing being added thereto or taken therefrom: *State v. Ryan*, 99 Wis. 123, 74 N. W. 544; *Gilbert v. Dutruit*, 91 Wis. 661, 65 N. W. 511. The quoted language was changed somewhat by the amendatory act of 1878: Laws 1878, c. 306.

The law as changed retained all the significant words of the original act or used equivalents so as to make the dominant features more prominent. The act is in harmony with elementary principles. If it were not for the emphatic declaration the result would be the same in the absence of some provision of the charter to the contrary. It is thus laid down by text-writers, based on authority: "Membership dates in each case from the time when the insurance is effected," and "membership in the mutual insurance company ceases upon the termination of the policy": 21 Am. & Eng. Ency. of Law, 2d ed., 264-266.

From the foregoing it is evident that whatever private interests there were in the assets of the Farmers' company over and above sufficient to satisfy its liabilities were the property of persons holding unexpired policies therein, and that part of the legislation under which respondents seek to ⁴³⁰ justify the attempt to dispose of the corporate property without their consent must stand the same test as any legislative attempt to take property of one person and give it to another, or to impair contractual rights. We are not unmindful of the authorities called to our attention, which will be as fully as need be referred to hereafter, for support for the doctrine that there is something peculiar respecting the ownership of property of a mutual insurance company rendering it a subject of legislative disposal, or distribution by equity jurisdiction on the basis of recognizing all contributors to the fund, regardless of whether they are actual members of the company at the time thereof or not. We are unable to see any logical foundation in reason or in good law for any such doctrine.

Where is the ownership of the net assets of a mutual insurance company located? That the legal title is in the corporation goes without saying. The rule in that regard must be the same in case of one corporation as another. Why is not the equitable right—the real beneficiary interest—independently of the corporate use, vested in the members of the corporation in one case the same as in the other? It would seem that, after the corporate purposes are exhausted, the property of every business corporation belongs to its members, is self-evident. It is no answer to the proposition to say, no member has "any aliquot part of the corporate assets subject to identification, conservation and recovery," for that is true as to any corporation. It is likewise no an-

swer to say, it is no part of the business of a purely mutual insurance company to distribute its profits among the members, unless that is provided for by the contract or the organic act. Unless prohibited from doing so, such a corporation, in the event of its accumulating a needless surplus, may distribute the same to its members (*Mygatt v. New York P. Ins. Co.*, 21 N. Y. 52), and may make such distribution at such times and to such extent as the governing authority may determine: ⁴³¹ *Equitable Life Assur. Soc. v. Host*, 124 Wis. 657, 102 N. W. 579. Indeed, no reason is perceived why such an insurance company may not make rates with a view to the probable accumulation of a surplus and the distribution of so much thereof, from time to time, as may appear from experience not to be needed. Moreover, it may be that such distribution would be due to members and enforceable in case of the surplus being unreasonably large, as there is reason to believe it was in this case. Why was the company carrying a surplus equal to over six per cent upon the face of its policies and more than five times the amount paid into the corporate treasury on account thereof? Assuming the management was honest, does it not look as if the rates were made with a view to the probable accumulation of a surplus and probable dividends to members therefrom? The logic of counsel's argument at this point seems to fail entirely.

However, the question at issue is not what right a member of a corporation of the sort under consideration, while it is a going concern, has in its net assets, but what right has he when it ceases to do business, when its property must necessarily pass out of its hands, though his interest in the latter situation would appear to be more appreciable in case of a surplus accumulated in contemplation of a distribution thereof to members than otherwise. Obviously, if he has an equity in the surplus, whenever it is no longer needed in any reasonable view for the corporate business, the right to realize thereon must exist.

The authorities supporting the last foregoing are not numerous. One would not expect them to be on a matter which so appeals to one's common sense as necessarily right upon fundamental principles. However, harmonious quotations from text and judicial authorities could be given at great length. To illustrate: "The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person

⁴³² insured in the management of the affairs of the company, and the participation of each member in the profits and losses of the business, in proportion to his interest": 2 May on Insurance, 4th ed., sec. 548. "Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder": 2 May on Insurance, 4th ed., sec. 548; 21 Am. & Eng. Ency. of Law, 2d ed., 267; Korn v. Mutual Assur. Soc., 6 Cranch, 192, 3 L. ed. 195. "Although the members of a mutual company are not usually denominated stockholders, and are not stockholders in the usual sense of the word, yet they are in point of fact stockholders": 2 May on Insurance, 4th ed., sec. 549. "The property of the corporation belongs to its members": Opinion of district judge in Temperance Mut. Ben. Assn. v. Home Friendly Soc., 187 Pa. 38, 40 Atl. 1100. "There is nothing to prevent a mutual company from carrying on its operations with a view to profits and dividends": Mygatt v. New York P. Ins. Co., 21 N. Y. 52. In Riddell v. Harmony Fire Co., 8 Phila. 310, the distribution of the assets, not surplus, of a mutual organization was enjoined at the suit of a member on the ground that such distribution was improper, except on surrender of the charter or dissolution of the corporation. The case proceeds upon the ground that the property of a nonstock corporation, not public, needed for its business belongs to the members, but not recoverable, of course, in possession, so long as the corporation is a going concern. The title to the property in any corporation—the substantial beneficial ownership—is in its members: 1 Clark & Marshall on Private Corporations, 23.

Titecomb v. Kennebunk Mut. F. Ins. Co., 79 Me. 315, 9 Atl. 732, relied upon by counsel for the respondents, is in harmony with the foregoing, notwithstanding some discussion, which will be referred to hereafter. The case went upon the ground that there were no existing policy-holders. The last policy had expired. It was absolutely without membership.

In Carlton v. Southern Mut. Ins. Co., 72 Ga. 371, it was ⁴³³ held, generally, that a member in a mutual insurance nonstock company, in the absence of charter regulations, is entitled to participate in any lawful distribution of its surplus on the basis of a partnership agreement. It was said, quoting from the syllabus: "A mutual insurance company is based on the idea that each of the assured becomes one of the

insurers, thereby becoming interested in the profits and liable for the losses. Without a charter, such an organization would be governed by the general law of partnership."

In the case in hand the distributees were held to include all stockholders, and that the word "stockholders" under the terms of the charter included every person who had contributed to the fund on hand, whether holding any unexpired insurance or not. That conclusion was reached based on language peculiar to the charter. It has no application whatever to such a charter as the one in question on that point.

It does not seem best to spend further time on the branch of the case last treated. We hold that there is no difference between business corporations as regards ownership of property. In the general sense, every member of a mutual corporation is a stockholder and is the equal of any member similarly situated, or any member of any corporation having an equal interest, proportionally, as to holding the beneficiary title to the corporate assets. For corporate purposes only the corporate entity owns the property, otherwise it belongs to the members. No principle of law is more firmly founded in reason, and none more important to be kept in bold relief by courts so as to challenge the attention of those who have to do with corporate affairs, especially corporations dealing with the subject of insurance. The officers of such a concern have no greater authority over its assets, as regards appropriating the same to their private use, than those in other corporations. Neither does legislative power legitimately extend to interfering with property rights more in ⁴³⁴ one case than in the other. False notions of this matter, which may be, perhaps, attributed in part to courts, has led to the erroneous idea that the members of a mutual insurance company have no rights save those expressed on the face of their policies; that otherwise they have no interest in the corporate assets which the courts will protect. That is a very erroneous and very dangerous doctrine. Nothing will be more productive of good administration of such concerns as the one under discussion than to have it definitely proclaimed by the courts, as we do now, that, while the corporate property belongs to the corporation for corporate purposes, the corporation itself belongs to the members thereof, and that any such member, however small his interest, may knock successfully at the judicial doors to prevent the use of

the corporate assets in any other way than in strict harmony with what has been said. If such were not the case, wrongs of a serious nature would quite likely go without redress and rights without protection.

But it is said that under the reserved power in the constitution what the legislature may create, as regards corporate organizations, it may alter or destroy, and that as it may provide for the dissolution of a corporation it may also provide for the disposition of its assets. Regardless of the legislative control suggested, the law-making body has no authority to appropriate private property to the use of the state, except under the taxing or police power, or power of eminent domain, or to a private party. There can be no confiscation of corporate any more than of individual property.

"Corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law as well as a denial of the equal protection of the laws": *Covington etc. R. Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. Rep. 198, 41 L. ed. 560; *Pembina Con. S. M. & M. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650; *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. Rep. 1132, 30 L. ed. 118.

⁴³⁵ We are cited to the supposed ancient rule of the common law that upon the termination of a corporation its real estate reverts to the grantor and its personality to the sovereign and that its debts become extinguished. Some bearing is claimed for that. While it has some distinguished support in modern times (2 Kent's Commentaries *307), it long since became obsolete, if it ever was the law, except as regards public corporations. It was distinctly repudiated by this court in *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119. The authorities supporting such repudiation are substantially without conflict: *Late Corporation (Mormon Church) v. United States*, 136 U. S. 1, 10 Sup. Ct. Rep. 792, 34 L. ed. 481; 3 Purdy's Beach on Private Corporations, sec. 1327; 2 Cook on Corporations, 5th ed., sec. 641; 2 Morawetz on Private Corporations, 2d ed., sec. 1032; 5 Thompson on Corporations, sec. 6746. American courts have, except in a very few instances, never recognized the doctrine, and quite recently it was held by the court of queen's bench in bankruptcy that it never had any place in the common law of England. In *Re Higginson & Dean*, [1899] 1 Q. B. 325, 79

L. T. 673, Wright, J., said that no instance was recorded in the books where such doctrine was ever applied by any English court and referred to an American decision, *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234, where the contrary was held, as having been reasoned on a false basis. We may safely close this branch of the case by saying that, aside from dicta here and there, in the whole not worthy of serious consideration, there is no legitimate support anywhere for the rule that the property of a business corporation upon its termination and the payment of its debts goes otherwise than to its members, if it has members to take. It is quite remarkable that the ancient rule should, for well-nigh two centuries, have been confidently asserted from time to time by judges and text-writers as the law, including writers of such eminence as Bacon, Kyd, and Kent, have first been repudiated quite unanimously in America, and then be declared in the supposed place of its origin to ⁴³⁶ never have been a part of the common law. Here, the language of Justice Bradley, in *Late Corporation (Mormon Church) v. United States*, 136 U. S. 1, 17, 10 Sup. Ct. Rep. 792, 34 L. ed. 481, confining the application of the supposed ancient rule to public corporations has been universally adopted.

We should not pass wholly from this subject without referring to the fact that so learned a writer as Judge Elliott in his valuable work on *Private Corporations*, at section 606, adds to the corporations specified by Justice Bradley, to which the supposed ancient rule now applies, mutual insurance companies, referring to *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315, 9 Atl. 732, and *Cummins v. Hollis*, 108 Ga. 402, 33 S. E. 919. The *Titcomb* case (79 Me. 315, 9 Atl. 732) is also referred to in 2 *Clark & Marshall on Private Corporations*, at section 328, but without approval so far as bearing on the question in hand. It is unfortunate that so careful a writer as Judge Elliott should have lent his distinguished approval to the cases cited by adopting the construction thereof which he incorporated into his text. An examination of *Cummins v. Hollis*, 108 Ga. 402, 33 S. E. 919, shows that it went distinctly upon the ground that the corporation was public. It was based on the decision in *Mason v. Atlantic Fire Co.*, 70 Ga. 604, 48 Am. Rep. 585, which involved also a public corporation. By implication the *Hollis* case (108 Ga. 402, 33 S. E. 919), held that in case

of the dissolution of any corporation not public the net property would go to its members, using this language: "On the dissolution of a corporation of this character, its assets are appropriated in other ways than by a division among its members." In harmony therewith the same court said in *Dade C. Co. v. Penitentiary Co.*, 119 Ga. 824, 47 S. E. 338: "The mere fact that a corporation has no capital stock does not necessarily deprive its members of their proportionate rights in the corporate property."

True, in *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315, 9 Atl. 732, the supposed ancient rule of the common law was quoted with approval. That fact as it appears, has been a disturbing element⁴³⁷ in the preparation of text-books and in the decisions of some courts, but the fact remains that it was not applied to the case in hand. It was held, as before indicated, that the property escheated to the state because all the policies had expired and, therefore, the corporation was without membership. The idea was there met that in a distribution of a surplus by a corporation all persons who have ever been members of the company should be recognized, and it was said that such a rule for the distribution of corporate assets is entirely impracticable, as we have heretofore said. This language was used: "To distribute among them a small amount of assets, and to determine what each former policyholder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify."

It should be noted that in *Smith v. Hunterdon Co. Mut. F. Ins. Co.*, 41 N. J. Eq. 473, 4 Atl. 652, the rule of distribution condemned in the Maine case was adopted by a process of reasoning not deemed to be logical. It ignored the obvious fact that the members of a corporation, and the members only, own the corporation, and that it is not permitted to any court upon its own notions of equity to take any part of the corporate property and distribute it to those not members. If the rule were applicable in any event, it could not be to a corporation whose charter expressly provides, as in this case, that only persons holding unexpired risks shall be deemed members. The New Jersey court was evidently persuaded to the course adopted by *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371, failing to observe that it turned upon a construction of language in the charter which the court felt bound to hold

was used to make everyone who contributed to the corporate surplus a member, or stockholder, as was said, for the purposes of any distribution of such surplus.

No hardship can result to members of a mutual insurance company from their relation with the organization being considered as above stated. Every policy-holder knows, or ought ⁴³⁸ to know, that he will remain a member so long as he remains a policy-holder and no longer. He knows, or ought to know, that as soon as his membership relation is established he becomes possessed of an equitable interest in the assets of the company consisting of all accumulations prior to his time, and such as may be added thereto during his membership, but which cannot be realized on in possession in the absence of a necessary distribution of the surplus on account of the company going out of business, or in some proper way. He knows, or ought to know, that it is entirely optional with him whether to preserve his interest in the company and thereby protect his contingent rights, or to allow them to lapse by ceasing to be a member. He also knows, or ought to know, that in case of his interest so lapsing it will inure to the benefit of those associated with him who choose to retain their memberships and those who come after him, the doors of the company swinging freely to let in new members and to let old ones out according to choice, those at any moment of time being then and then only the owners of the company to all intents and purposes the same as members of any other corporation.

To summarize at this point: The members of the Germantown Farmers' Mutual Insurance Company at the time of the proceedings under chapter 229 of the laws of 1903 to supersede it by a new corporation, denominated the Germantown Insurance Company, were the persons then having unexpired policies in the former. For all except corporate purposes they were the beneficial owners of its assets. In case of its being wound up the net assets constituted a fund for distribution between the members according to their respective contributions to the company's treasury. In case of any distribution of its surplus, other than following a dissolution, they were entitled to so participate. The surplus in excess of the reasonable needs of the corporation was a proper subject for distribution at any time. The right of the corporation to hold ⁴³⁹ its property in harmony with that situation, and the

rights of the members to have the same so held and administered, were property interests resting on contractual obligations and so within the guaranty of the state constitution as regards the passage of laws impairing the obligations of contract, section 12, article 1, of the constitution of Wisconsin, and that of the national constitution as regards the deprivation of property without due process of law, or denying to persons the equal protection of the laws: U. S. Const., 14th Amend. Due process of law does not extend to the taking of private property or the violation of private rights for private ends. The act of the legislature in question, in terms or in effect, authorizes the appropriation of the property of one private corporation and the equitable interests therein of the members thereof to the use of another private corporation and of its members in violation of the corporate charter rights of the former corporation, and in defiance of the wishes of such of its members as do not choose to consent thereto. The proposition affirmed by counsel for respondents, stated at the outset in the opinion, must, therefore, be answered in the negative. The act of the legislature, laws of 1903, chapter 229, is unconstitutional and void and furnishes no justification for the acts complained of. To that extent the complaint states a good cause of action and should have been sustained.

All cases and the authorities, generally, so far as we can discover, not excepting the one to be presently specially mentioned, upon which counsel for respondents mainly rely, are in substantial harmony as regards members of a corporation of the sort under discussion being the owners of the corporate property, subject to the corporate purposes, in the absence of some charter provision to the contrary, as we have held. If there was want of harmony as to who are to be deemed members of a corporation of the kind in hand, in the absence of a charter provision on the subject, it would not be material in this case since the charter here expressly provides that only ⁴⁴⁰ the holders of unexpired policies can be deemed to be members.

We have thought best to proceed to this point without referring to the decision most confidently relied upon by counsel for respondents—*Grobe v. Erie Co. Mut. Ins. Co.*, 24 Misc. Rep. 462, 53 N. Y. Supp. 628, affirmed, 39 App. Div. 183, 57 N. Y. Supp. 290, or the one on which with equal confidence

counsel for appellant rely—Schwarzwaelder v. German Mut. F. Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769, because the former, when rightly understood on the main point—that as to the validity of legislation providing for the transfer of the property of one corporation to another and the substitution of the latter for the former without the consent of all of the members of the old corporation—is entirely inapplicable to the case before us from the attitude of respondents, and is in harmony with the case relied upon by appellant, as we shall see, and both bear on the question yet to be treated of, whether if the appellant has a ground of complaint he invoked the proper remedy.

Before proceeding to the next point we will state briefly our view of the above-cited New York case on the main question. The court there met this situation: The insurance company sought to be superseded was formed in 1874 under a general law. There was a reorganization law then in force substantially like the one here, except that it treated all policy-holders of any mutual company sought to be superseded, at the time of the reorganization proceedings, owners of the company as regards the right to take the entire stock in the new corporation. In short, it contemplated the substitution of one corporation for another without any change of membership, except at the option of the members of the old corporation. When the subject of dispute was organized there was a system of laws on the statute books, originating as early as 1853 and continued to and inclusive of the reorganization proceedings, authorizing any mutual insurance company by ⁴⁴consent of two-thirds of its members to reorganize on the stock plan. The law in that regard, as the court held, became, by implication, at the creation of the charter of the corporation sought to be superseded a part of such charter. The court said that every person who participated in the reorganization knew of the fact, or ought to have known of it, and that by joining the company he impliedly agreed to submit to a reorganization of it at any time in the future whenever the requisite two-thirds of its members so desired and the legal requirements in the matter were complied with. The result was that the reorganization was sustained solely on the ground that the reorganization proceedings were in harmony with the charter of the corporation sought to be superseded. That, as it will be observed, is

in perfect harmony with the decisions as regards laws authorizing the turning of voluntary organization into corporate entities. We have just held (*Spiritual etc. Temple v. Vincent*, 127 Wis. 93, 105 N. W. 1026) that such reorganization law as to corporations antedating its passage cannot disturb their property rights. That is in harmony with authorities generally: *Schiller Commandery v. Jaennichen*, 116 Mich. 129, 74 N. W. 458. The difficulty with the position of counsel for respondents, as regards the New York case, is this: There was a reorganization act preceding the corporate charter and was in effect a part of it, while here the reorganization act came after the charter, and, therefore, if given effect, is a modification of it interfering with vested property rights. The vital part is not the change of the charter but the confiscation, so to speak, of the corporate property. Inferentially the New York court held that in the circumstances we have here the reorganization law could not be sustained.

Turning to the New Jersey case, upon which counsel for appellant rely, the situation before the court was precisely like that here. There was no provision, express or implied, in the charter of the corporation sought to be superseded authorizing ⁴⁴² a reorganization without the consent of all its members, or at all. The reorganization act, the same as here, came subsequent to the corporate charter. The corporation was formed in 1893. The plaintiff became a member thereof in 1898. The reorganization act was passed in 1899. The court held that such act, as regards authorizing a new corporation to supersede the old one contrary to the wishes of any member of the old one, was unconstitutional. Thus it will be seen that both cases are in harmony. Both condemn the act in question.

On the subject of whether plaintiff has a cause of action in equity the point is made, in addition to those heretofore discussed, that the complaint, in effect, admits the incorporation of the stock company; that therefore it became vested with the property of the old organization, and, there being no allegation that the new company is not ready, willing, and able to pay all the liabilities of the old company, the latter could not maintain this action, therefore plaintiff cannot. The complaint, as we understand it, makes no admission that the new company is vested with the title to the assets of the Germantown Farmers' Mutual Insurance Company. It ad-

mits that it has manual possession thereof, but charges that the legal title and right of possession is in the mutual company. It further alleges that the officers of the latter are so concerned in the commission of the wrong that there is no reasonable ground to expect that they will efficiently assert its rights. That makes a clear case for the plaintiff, since he is pecuniarily interested in the protection of the old company's rights, to invoke equity to enforce its cause of action. Whether the right of the mutual company is legal or equitable makes no difference as regards the rights of the appellant to invoke equity. That field of judicial activity only is open to him. One of the most common and important subjects of equity jurisdiction is the protection of equitable rights formed on legal or equitable rights of corporations, public or private, ⁴⁴³ when those who should resort to judicial remedies to conserve the same will not do so: *Land L. & L. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 925, 75 N. W. 964; *Kircher v. Pederson*, 117 Wis. 68, 93 N. W. 813; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132.

The doctrine of the New York court, cited to our attention from *Grobe v. Erie Co. Mut. Ins. Co.*, 39 App. Div. 183, 57 N. Y. Supp. 290, that "the unascertained interest of a mere member of a corporation is not of sufficient significance to challenge attention of a court of equity to protect it. To permit corporations to be managed by suits in equity, instituted in the interests of persons holding such indefinite rights, would produce intolerable confusion and end substantially in the destruction of such enterprises," has no place here. We had occasion to examine it at some length in *Land L. & L. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 925, 75 N. W. 964. It is entirely inconsistent, as it seems, with the real functions of equity jurisdiction. The idea that a member of a corporation pecuniarily interested in the vindication or prevention of some wrong to it, which it has not capacity to do for itself because of the attitude of unfaithful officers, cannot in behalf of himself and others similarly interested apply successfully at the door of equity because his interest as a single member is small, is unworthy to be entertained. It has not found and cannot find any favor here. There is no such reproach upon our judicial system. The jurisdictions are exceptional where the rule is not recognized and broadly applied that where a cause of action exists in

favor of a corporation and its governing body refuses to enforce it, any member thereof may do so, suing in equity in behalf of himself and others. The direct injury to the corporation is the primary end, in such action, to be remedied. It may be very large and the interest of the active instrument in conserving it may be very small. The former is the significant end, the latter is sufficient for the case so long as it is appreciable as a property interest: 4 Thompson on Corporations, 444 sec. 4479. In *Schwarzwaelder v. German Mut. F. Ins. Co.*, 59 N. J. Eq. 589, 44 Atl. 769, under such conditions as we have here, equity jurisdiction at the suit of a single policy-holder enjoined the reorganization proceedings upon the ground that the threatened injury to him was irreparable. The court held that the reorganization could not proceed against the protest of a single member, and that as neither the common law nor statute offered any adequate legal remedy for such a deprivation of property the matter was within one of the well-recognized heads of equity jurisprudence.

The point is made that the complaint alleges that the Germantown Insurance Company is a corporation organized under the provisions of chapter 89 of the statutes of 1898, and charter 229 of the laws of 1903, and that such being the case it must necessarily, as a de facto corporation at least, be the owner of the assets of the old corporation and beyond the reach of any but direct proceedings at the suit of the state to inquire into its right in the matter. True, the complaint so alleges, but the allegation must be construed in the light of the whole pleading. It can mean no more than that everything was done, which it was competent to do under the laws referred to, to make the Germantown Insurance Company a corporation. The whole gravamen of the pleading is that the law of 1903 offends against the constitution and therefore everything done under it is void. The complaint states: "The individual defendants with divers other persons combined and confederated for the unlawful purpose" of depriving the Germantown Farmers' Mutual Insurance Company of its property, "and therefore caused to be organized the above-named defendant, Germantown Insurance Company, and thereafter undertook to reincorporate said Germantown Farmers' Mutual Insurance Company into a stock corporation under the name of the Germantown Insurance

Company, and undertook" to transfer the property of the old company to the Germantown Insurance ⁴⁴⁵ Company, and through the acts of such individual defendants the latter company converted the property of the old corporation to its own use. While it speaks of the new creation as a corporation it pleads the underlying fact—the fact that the proceedings to incorporate it are such only as the reorganization act, in terms, authorized. Whatever there is in the complaint, suggesting in terms that the legal effect of such acts was to create even a de facto corporation, is contrary to the whole spirit and obvious intent of the pleading and in any event cannot control contrary to the law governing the matter. The law of 1903 being unconstitutional, as we hold it to be, and being the inducing feature of the legislative scheme under which the reorganization occurred, the whole must fall together; that is, the general statute as regards the corporation of mutual insurance companies must be deemed to have been incorporated in the act of 1903 for a complete scheme of reincorporation of mutual insurance companies. Clearly the legislature would not have used the general law for the incorporation of insurance companies as a means of turning existing mutual into stock companies as it did without the enabling act of 1903. That law must be deemed the inducing provision and so the whole scheme falls under constitutional limitations: *Slauson v. Racine*, 13 Wis. 398; *State v. Dousman*, 28 Wis. 541; *State v. Sauk Co.*, 62 Wis. 376, 22 N. W. 572; *Gilbert-Arnold L. Co. v. City of Superior*, 91 Wis. 353, 64 N. W. 999.

The foregoing results in the respondent company having no basis for corporate existence but the unconstitutional law, which is not sufficient to support even a de facto corporation. The latter can exist only where there is a valid law under which the corporation might have been created de jure. It is in the latter situation that the existence of a corporation can only be inquired into by a direct action in the name of the state: *Evenson v. Ellingson*, 67 Wis. 634, 646, 31 N. W. ⁴⁴⁶ 342; *In re Incorporation of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; *Gilkey v. How*, 105 Wis. 41, 81 N. W. 120, 49 L. R. A. 483; *Winneconne v. Winneconne*, 111 Wis. 10, 86 N. W. 589; *Methodist E. U. Church v. Pickett*, 19 N. Y. 482; *Vanneman v. Young*, 52 N. J. L. 403, 20 Atl. 53.

It is proper and perhaps best to observe, in passing, that upon the facts alleged the title to the business and assets formerly possessed by the Germantown Farmers' Mutual Insurance Company is still in such company entirely unimpaired by the reorganization law and the acts which occurred under it. The business conducted by its pretended successor, the Germantown Insurance Company, must be regarded as a mere continuation of its business with all that such situation means.

If it were a fact in the case before us that the Germantown Insurance Company was a valid corporation, it would make no difference with plaintiff's cause of action if the fact remained that it had obtained wrongful possession of the assets of the Farmers' Company and the officers of the latter would not take the proper steps to remedy the mischief. This is not an action necessarily depending on whether the wrongdoer was a valid corporation or not. It is not an action to inquire into corporate existence. It is one to recover into the possession of the Germantown Farmers' Mutual Insurance Company its property in specie, or the equivalent thereof, which has been, as is alleged, wrongfully taken from it. That might be accomplished whether the new company was or was not a corporation *de jure* or *de facto*. It is only a mere incident of the action that it is held to be neither.

Some other questions of minor importance are discussed in the briefs of counsel. They are included, it is thought, in those heretofore treated, or are rendered immaterial by what has been said. The discussion of the ground of demurrer that the complaint is insufficient to state a cause of action, to which this opinion has been mainly directed, really covers ⁴⁴⁷ the charge of want of jurisdiction and want of capacity to sue. The cause of action of the Farmers' Company is grounded on the wrongful conduct of the individual defendants, which was made fruitful by means of the unconstitutional law under which the new company was organized, in that it resulted in depriving the Farmers' Company of its property. The cause of action of appellant, standing for himself and others, is grounded on his pecuniary interest in the enforcement of the rights of his company. His right is equitable, and his remedy necessarily so. On that account, and since there is no legal remedy for him, the indirect injury is of sufficient and substantial character to be a proper

subject for redress. The jurisdiction of the subject matter is grounded on the necessary uses of equity, and the insufficient basis for the corporate existence of the new organization, if that were a necessary fact. Plaintiff's legal capacity to sue is based on the foregoing situation and the fact that without such capacity the wrong complained of would go unredressed, the attitude of those who only could directly act for the Farmers' company being hostile to such action. The challenge to the jurisdiction of the person and to improper joinder of causes of action appears not to be pressed here, and to be so obviously without merit as not to require more than this passing mention.

We apprehend that we have sufficiently covered the whole subject presented for consideration as to render it useless to proceed further.

By the COURT. The order appealed from is reversed.

Respondents moved for a rehearing.

Lewis & Roach, attorneys, and Quarles, Spence & Quarles, of counsel, for the appellant.

Sawyer & Sawyer and G. A. Kuechenmeister, for the respondents.

448 The following opinion was filed March 20, 1906:

MARSHALL, J. All points suggested to secure a modification of the former decision have received due attention. The argument in favor of the motion in that regard is sufficiently headed "Explanatory." Why counsel regarded an explanation of their position necessary is not perceived. Counsel are always presumed here to present in good faith the cause of their client as they find it. They are not supposed, in any case, to be otherwise concerned. It was not thought here, prior to the explanation, that the situation was difficult in this instance than commonly. Any case after presentation here must necessarily be disposed of as it seems to deserve. If it is a bad one, such disposition is liable to indicate that character with more or less clearness, yet without any reflection whatever on counsel for merely having performed professional duties, giving the best reasons occurring to them, after a diligent study of the subject, and referring to authorities within their reach, by them supposed to apply,

to aid the court. We may well credit counsel for respondents with having distinguished themselves in that regard. They probably called to our attention, and in a helpful manner, every feature of the law of 1903 affecting favorably its validity. With like probability they invoked every legal principle bearing upon the matter, citing an array of authority for examination, evincing the most commendable industry. The case of respondents did not suffer for want of any aid counsel could have afforded the court.

What is said in the discussion in support of a decision is directed wholly to the case as it appears. That is treated in a wholly impersonal way. It may reflect on the party responsible for the situation, but not on the attorney who merely performs his professional duty. It does not seem, here, that any explanation whatever was required from counsel who so ably presented the case at the bar, or the other distinguished ⁴⁴⁹ counsel who was absent, both of whom are held in the highest regard.

What was formerly said as to that part of the decision holding that the so-called reorganized company is not even a de facto corporation was grounded upon very familiar principles. The result was inevitable. It cannot be changed. If it were true that the decision in that regard will result in the hardships suggested, as to leaving a large number of policy contracts in a state of uncertain validity, and a large amount of securities, taken in the name of the new organization, with an uncertain status, it would not change the law. If one unlawfully takes the money of another and loans it to a third person presumed to know the facts, it is hardly a good answer to a claim for restoration that the vindication of the right of such other will embarrass the wrongdoer and those who have dealt with him, on account of the former having confused his money with that of such other and loaned the two in combination to the third person.

It is thought that the former opinion renders it plain that the business of the so-called new corporation was in effect a mere continuance of that of the Farmers' company under a somewhat new name. The so-called new policy-holders, and the so-called old policy-holders whose contracts have not expired, are policy-holders with equal standing in the Germantown Farmers' Mutual Insurance Company. The last officers elected of such company are still its officers, and will nec-

essarily continue to be such until their successors shall have been duly elected and qualified according to the charter. Whatever titles there are outstanding as to tangible or intangible things, belonging to the Farmers' company are held merely in trust therefor by the collection of individuals who have assumed another name. The whole beneficial interest in such property is in the Farmers' company. It has a right to be immediately clothed with the legal title thereto, so far as it is not possessed thereof, and to that extent the trustees of the ⁴⁵⁰ same are fully competent, without delay, to make the proper conveyance. Facing the situation just as it is, without thought of how to avoid the effect, it is not perceived why there is any physical or legal difficulty in promptly restoring the former situation, preserving reasonably the equities of the promoters of the new enterprise growing out of their money having been paid into the common fund for so-called stock.

We note what counsel say as to persons holding policies issued in the name of the so-called new company not having participated in, and so perhaps not being bound by, the adjudication that such company is not a corporation in any sense and may hold it to be otherwise on the doctrine of estoppel. We are not unmindful of the rule in that regard and that in some circumstances it extends beyond corporations de facto and includes such cases as that of a collection of persons falsely assuming to be a corporation, when there is no semblance of corporate existence: *Citizens' Bank v. Jones*, 117 Wis. 446, 94 N. W. 329; *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028. It does not apply, however, where the parties knew, or ought to have known, the true situation, for then the essential element, the reasonable belief in the corporate existence and reasonable reliance thereon, does not exist. Here all parties must be presumed, conclusively, to have known that the ostensible corporation was not a corporation at all, but was a mere usurping representative of the Farmers' company.

So it will be found by looking at the matter rightly that the supposed difficulties in the way of a restoration of the rightful condition of things as to the Farmers' company, are but specters—merely contemplated, they may grow; approached with one purpose, they will merely recede; approached with a firm determination to accept the inevitable

situation, they will disappear as the dew before the morning sun.

By the COURT. The motion is denied.

The Effect of the Transfer or sale of all the property or assets of a corporation is discussed in the note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548-572; and the effect of the consolidation of corporations is considered in the note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604, 656.

Actions by Stockholders on behalf of the corporation are discussed in the note to *Johns v. McLester*, 97 Am. St. Rep. 29-52.

JACOBSON v. BENTZLER.

[127 Wis. 566, 107 N. W. 7.]

PAYMENT.—The Acceptance of a Check is in the nature of a conditional payment, which becomes complete when the amount due on it is actually paid. Such payment relates back to the time of the delivery of the check. (p. 1054.)

SUNDAY CONTRACT—Subsequent Completion of Transaction. Where an agreement for the loan of money is made on Sunday, including the signing of the contract, and the delivery of a check for the amount of the loan, the transaction is not relieved from the condemnation of the Sunday law by the fact that the check is not paid and the contract not acknowledged nor recorded until a later day. (p. 1054.)

SUNDAY CONTRACT—Loan of Money—Ratification.—The loaning of money is within the meaning of a statute prohibiting the doing of business on the first day of the week, and a contract therefor is void and not susceptible of ratification. (p. 1054.)

SUNDAY CONTRACT—Manner of Reaching Invalidity.—In an action to enforce a loan made on Sunday, the fact that the defendant in his answer did not assert the invalidity of the contract does not preclude him from insisting that the agreement cannot be enforced. (p. 1054.)

SUNDAY CONTRACT.—Upon the Grounds of Public Policy, all the parties to a Sunday contract are deemed equally guilty, and are denied the usual remedies of the law for its enforcement. (p. 1054.)

J. A. Eggen, for the appellant.

McElroy, Eschweiler & Wetzler, for the respondent.

⁵⁶⁷ SIEBECKER, J. Plaintiff alleges that he loaned and advanced defendant the sum of one thousand dollars and that defendant agreed to repay the sum on demand. He

claims that demand has been made and that no part of the sum has been paid. Defendant denies that a loan was ever made, and alleges that he conveyed certain real estate to the plaintiff in consideration of the one thousand dollars. He further alleges that the deed was executed and delivered upon an express agreement in writing that upon repayment of the sum, and provided he had paid the taxes levied on the property, he might demand a reconveyance, but that in case of failure to pay such taxes then the contract was to be null and void. He alleges that he has not paid the taxes and that the right to demand a reconveyance no longer exists, and he asserts that plaintiff has not offered to reconvey. The evidence on the trial shows that all the transactions involved took place on Sunday, including the delivery of the check for one thousand dollars, the signing and delivery of the written agreement, and the delivery of the deed. The only act not positively shown to have taken place on Sunday refers to the acknowledgment and the recording of the deed, and this is left in uncertainty by the statements of the plaintiff. At the conclusion of plaintiff's evidence defendant's motion for a nonsuit ^{was} was granted by the court. A motion for a new trial was denied, and judgment for costs was rendered for defendant. This is an appeal from such judgment.

The evidence of the plaintiff shows that the transactions on which relief is sought took place between the parties on Sunday. It is undisputed that plaintiff on this day delivered to and that defendant received from him a check for one thousand dollars; that the written agreements expressing the conditions of the loan were executed and delivered on Sunday; and that the deed, which had been signed by the grantor, was handed to plaintiff on the same day. The only part of the transaction which occurred thereafter was that the defendant had the deed acknowledged and left for record, with directions to the register of deeds to mail it to the plaintiff. The time of payment of the check and the acknowledgment and recording of the deed are relied on as showing that the alleged loan was not made on Sunday: Firstly, upon the ground that the alleged loan to defendant was not made until the check had been paid at the bank; and, secondly, it is claimed that the loan was not made until the deed was acknowledged, recorded, and transmitted by mail to plaintiff, and that these acts were essential to the delivery of the deed and were neces-

sary steps to give legal efficacy to the transaction. As to the first point it seems clear that acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted and when the amount due on it is actually paid, and that such payment relates back to the time of its delivery: 22 Am. & Eng. Ency. of Law, 2d ed., 569; 2 Daniel on Negotiable Instruments, 5th ed., sec. 1623. Under the circumstances shown, the fact that defendant received the money on the check after Sunday does not relieve the transaction from ^{see} the operation of the Sunday law. The same is true with respect to the acknowledgment, the recording, and the transmission of the deed. These were mere incidents to the transaction which constituted the making of the loan. The alleged obligation for the repayment of the money loaned arises out of what took place on Sunday.

Plaintiff is not relieved from difficulty by the claim that the acts done after Sunday were in the nature of a ratification of that which preceded, for it has been held that the loaning of money on Sunday is within the meaning of the statute prohibiting the doing of business on the first day of the week. This makes the contract void and not susceptible of ratification: Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, and cases cited; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787; Sherry v. Madler, 123 Wis. 621, 101 N. W. 1095. The fact that defendant in his answer did not assert the invalidity of the contract upon the grounds now advanced does not preclude him from insisting that the agreement cannot be enforced. Upon the ground of public policy, all the parties to such an agreement are deemed equally guilty and are denied the usual remedies of the law for its enforcement: Pearson v. Kelly, 122 Wis. 660, 100 N. W. 1064.

The judgment dismissing the action was properly awarded.

By the COURT. Judgment affirmed.

Sunday Contracts and their ratification are discussed in the note to Henry Christian B. & L. Assn. v. Walton, 59 Am. St. Rep. 641-644. In North Carolina a contract to convey land entered into on Sunday is valid: Rodman v. Robinson, 134 N. C. 503, 101 Am. St. Rep. 877. In Maryland contracts made on Sunday, if executory, cannot be enforced. If they are executed, however, they cannot be avoided: Rickards v. Rickards, 98 Md. 136, 103 Am. St. Rep. 393. In Michigan a Sunday contract cannot be ratified: Acme Elec. etc. Co. v. Van Derbeck, 127 Mich. 341, 89 Am. St. Rep. 341.

The Acceptance of a Check or Note is not generally regarded as payment of a precedent debt: Delaware County Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763; Burrows v. State, 137 Ind. 474, 45 Am. St. Rep. 210; note to Meyer v. Green, 69 Am. St. Rep. 346.

**ABRAMS v. UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY.**

[127 Wis. 579, 106 N. W. 1091.]

GUARDIAN—Duty to Invest Ward's Funds.—It is the duty of a guardian, on receiving the funds of his ward, to invest so much of them as is not required for immediate and necessary use, as soon as he can do so with reasonable diligence. (p. 1058.)

GUARDIAN—Employment of Attorney to Collect and Invest Funds.—A guardian may employ attorneys or agents to reduce the estate of his ward to possession and to protect it, but when once in his hands his personal duty to dispose of and manage it begins, which cannot be delegated. Therefore, if a guardian employs an attorney to collect the estate, and the funds collected are represented by checks or drafts payable to the guardian, he is accountable therefor where he indorses and hands them back to the attorney for investment, and the latter defaults. (p. 1059.)

GUARDIAN—Interest of Ward's Funds.—The time from which a guardian should be charged with interest on the funds of his ward, lost through his negligence in investing them, is a matter resting in the sound discretion of the trial court in view of all the facts. (pp. 1059, 1060.)

GUARDIAN—Allowance for Support of Ward.—Where a guardian has voluntarily stood in loco parentis to his wards, and has never intended to charge them for lodging or services, neither the guardian nor his surety is entitled to any credit therefor. (p. 1060.)

GUARDIAN.—In an Accounting by a Guardian, annual rests should be made, the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest. (p. 1060.)

GUARDIAN—Costs.—In an Action by a guardian to compel his predecessor to account, it is proper to allow costs against a surety who appears in and defends the action. (p. 1060.)

Thompson, Thompson & Pinkerton, for the appellant.

Carl D. Jackson, for the respondent.

⁵⁸⁰ WINSLOW, J. This is a proceeding to settle the final account of Sarah Perry as the guardian of the estate of certain minors. The appellant was a surety upon the guardian's bond, and was ⁵⁸¹ made a party to the proceedings in the county court, and appealed from the order of that court set-

ting the guardian's account to the circuit court, where the matter was again tried and the account settled, and from that judgment the surety appeals to this court. There was little substantial dispute as to the facts. It appeared that Herbert D. Avery and his wife, Ida, resided in Colorado, where Ida died December 4, 1899, leaving four small children, Bessie, Perry, Alois and Marie, the minors in question, and about December 20, 1899, Sarah Perry, a sister of the deceased, went to Colorado and brought the children to her home in Winnebago county, in this state, to live with her, under an arrangement with the father that the father was to pay what he could for their keeping; that the father afterward sent on various sums for this purpose, amounting to \$330 in all; that the father was killed in a railroad accident on the Colorado and Southern Railway October 18, 1900, leaving the four children as his only heirs at law; that Sarah Perry was appointed guardian of the persons and estate of the minors by the county court of Winnebago county December 4, 1900, and gave a guardian's bond in the sum of \$8,000, with the appellant as surety; that the guardian at once employed one Herbert L. Sweet, then an attorney of good standing in Oshkosh, as her attorney; that at the time of Avery's death he had two policies of life insurance, one in the Independent Order of Foresters, of \$3,000, and one in the Ancient Order of United Workmen, of \$2,000, both being in favor of his heirs; that he also left some property in Colorado, which was afterward administered upon, the net amount realized being \$482.98; that there was also an unsettled claim against the railroad company for the death of said Herbert; that the mother, Ida, left forty acres of land in Winnebago county, title to which passed to the minors; that Miss Perry, as guardian, put the various claims into Sweet's hands for collection, and that under authority from the county court of Winnebago county a settlement ⁵⁸² was arranged by Sweet with the railroad company of the death claim on the basis of the payment of \$1,250. Miss Perry, as guardian, signed a receipt and release for this claim, and Sweet sent the same to the railroad company, and a check for \$1,250 was returned to Sweet. There was no direct evidence as to whether this check was payable to the guardian or to Sweet. The court found, however, that it was payable to Miss Perry and was indorsed by her and turned over to Sweet. The

claim against the Independent Order of Foresters was also collected by Sweet, the draft being sent to him, payable to the order of Miss Perry, who indorsed the draft and signed the receipt and returned both draft and receipt to Sweet. The guardian testified, and the court found, that she left these drafts in the hands of Mr. Sweet for investment, and that the same course was pursued with the sum of \$482.98 collected from the administration of Avery's estate in Colorado. It appeared without dispute that Sweet immediately deposited the drafts in each case to his own credit in the bank. The sum of \$2,000 from the Ancient Order of United Workmen was paid to Miss Perry in cash, and she kept \$1,000 thereof, and took the other \$1,000 to Sweet and left it with him to invest. Sweet returned to Miss Perry \$200 out of the \$1,250 received from the railroad company, but did not return any other sums. He claimed that he had invested the money in real estate mortgages, and to deceive Miss Perry made some payments to her of sums which he claimed to have received as interest on the investment, but he never turned over to her any securities, and in fact used the moneys himself as soon as he received them, and left the city in the spring or summer of 1902, leaving many thousand dollars of liabilities, including his liability to the guardian. Miss Perry made no effort at any time by suit to obtain the moneys or the securities from Sweet. She made no charge at any time against the infants for care, lodging, or food, but kept accurate account of the moneys expended for clothing, school ⁵⁸³ books, and other incidentals. She testified that she never intended to charge them for care or lodging, and the court found that she stood in the relation of parent to them. In the account, as settled by the circuit court, the guardian was charged with the sums received from the insurance companies, the railroad company, and from the estate in Colorado, with interest on such sums at six per cent, commencing two months from the receipt thereof upon part of the sums, and three months upon the remainder. She was also charged with the payments made to her by Sweet as interest, and with \$108 received from the forty acre farm as rent. She was credited with the sums which she paid for taxes and repairs upon the real estate, also, with the sums paid for clothing and incidentals paid for the minors, and with the premiums paid for her bond. She was allowed \$50 as a reasonable amount for

legal services, and \$1,450 for food furnished to the minors from December 20, 1899, to February 20, 1904, less \$330 received from the father. She resigned as guardian of the estate of the minors February 20, 1904, and the respondent Abrams was appointed to that trust, and this accounting was thereafter had.

The guardian was a trustee of the funds of her wards. It was her duty, on receiving such funds, to keep them for her wards, and to invest so much of them as was not required for immediate and necessary use, as soon as she could do so with reasonable diligence. She could employ an attorney to collect them, and, if she exercised reasonable care and prudence in the choice of an attorney, doubtless she would be protected from losses occurring by the fraud or negligence of the attorney in the course of his duty as collecting agent; but when she had received the funds by draft or in cash ⁵⁸⁴ the functions of the attorney for collection ended, and if she then placed the fund in his hands to invest he became simply an agent to whom she had attempted to delegate her duties as trustee. Mr. Lewin, in his work on Trusts (volume 1, page 252), says: "Trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they do so they remain subject to the responsibility toward their cestuis que trustent for whom they have undertaken the duty. If a trustee, therefore, confide the application of the trust fund to the care of another, whether a stranger, or his own attorney or solicitor, or even cotrustee or coexecutor, he will be held personally responsible for any loss that may result."

This principle is firmly established. It does not mean that a trustee may not employ a broker or attorney to do those things which in the ordinary course of business such agents would be employed to do, but simply that he cannot delegate to others the doing of those things which he is in duty bound to do himself. The collection of claims against others involving actions at law or negotiations for settlement may well be intrusted to an attorney. The guardian has not undertaken to act as an attorney, but the care and investment of the funds which reach his hands is one of the very things which the guardian has agreed to attend to, and if he delegates this duty to another, whether he be an attorney or a lay-

man, he makes such other his personal agent and is responsible for his acts. A guardian's duty, by the terms of his appointment, is "to dispose of and manage" his ward's estate according to law, and such is the tenor of his bond. He may employ attorneys or agents according to the usual course of business to reduce the estate to possession and to protect it, but when once in his hands his personal duty to dispose of and manage it begins, and this duty is not to be delegated.

These considerations really dispose of the most serious question raised by the appellant in this case, namely, the ⁵⁸⁵ question whether the guardian should be charged with the sums received from the railroad company, the Order of Foresters, and the administrator of Avery's estate in Colorado. The claim is that these sums never, in fact, came to the hands of the guardian, but were squandered by the attorney in the process of collection. The court found, upon sufficient evidence, that these amounts were represented by bank drafts or checks payable to the order of the guardian, which came to the guardian through the attorney, and that the guardian indorsed them and handed them back to the attorney, to be invested by him for her as guardian. It must be held that, when the draft came to her hands, she came into possession of so much of her ward's estate. Her personal duty to manage that estate then began. It is claimed that interest should not have been charged upon the funds which came to the guardian's hands prior to the expiration of six months from the time of their receipt. This is a matter resting in the sound discretion of the trial court in view of all the facts. The court allowed about two months upon a part of the funds, and three months upon the balance, during which time no interest was charged. The fact being that the guardian absolutely neglected her duties and made no attempt to invest the funds, we cannot say that there was any abuse of discretion: In re Thurston, 57 Wis. 104, 15 N. W. 126. Interest was charged on the sum of \$482.98, received from the estate of Herbert D. Avery, from April 1, 1901, and it is claimed that the testimony shows that this amount was not actually received until November, 1901. There was certainly testimony to this effect, but by the stipulation of facts in the case it was expressly stipulated that the sum was received about February 1, 1901, and that no testimony should be received in conflict

with the stipulation. As no application was made to the trial court by the appellant to be relieved from the stipulation, it must be held to control.

It is contended that the court should have allowed the ~~use~~ guardian a reasonable sum for lodging of the children and for her personal services in their care. The fact was that she voluntarily stood in loco parentis to these children and never intended to charge them anything for lodging or services. Under these circumstances neither the guardian nor the surety has any right to such credit: *Hutson v. Jenson*, 110 Wis. 26, 85 N. W. 689. The court allowed the guardian interest on her disbursements at six per cent per annum from a period midway between the time of her appointment and the time of her resignation. This was not the proper plan of accounting. Annual rests should have been made, and the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest; but, as the result of the method adopted by the court is more favorable to the appellant, there was no prejudicial error: *In re Thurston*, 57 Wis. 104, 15 N. W. 126. The allowance of costs in the circuit court is complained of, but no reason is perceived why such action was not strictly right.

By the COURT. Judgment affirmed.

The Power and Duty of Guardians in the matter of investing their ward's funds are considered in the note to *Schmidt v. Shaver*, 89 Am. St. Rep. 292.

IN RE GERTSEN'S WILL.

[127 Wis. 602, 106 N. W. 1096.]

FOREIGN WILL.—When a Will has Been Regularly Probated in the state of the domicile of the testator by a court of competent jurisdiction, a court of another state wherein the deceased left property cannot refuse the will probate, because some of the essentials of a valid original probate in the latter state are wanting, if the statutes of that state declare that "the will shall have the same force and effect as if it had been originally proved and allowed in the same court." (pp. 1061, 1062.)

WILL CONTEST—Attorneys' Fees.—Under the statute of Wisconsin providing that "any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may allow to the contestant, if successful in the circuit court;

a reasonable attorney's fee out of said estate for services in such contest in said circuit court," the first court mentioned refers to the one having primary jurisdiction of the probate of wills—the county court—as having authority to allow attorney fees. (p. 1062.)

Bushnell, Moses & Watkins, for the appellant.

George B. Clementson, for the respondent.

603 MARSHALL, J. Emer Gertsen died testate at her home in Cheyenne county, Nebraska, leaving property there and in Grant county, Wisconsin. She left a husband, who was her sole beneficiary, and two grandchildren, Albert and Charles Edwards, who were interested in her estate contingent upon the validity of the will. They were never residents of Nebraska. Proceedings were duly and successfully had in the home state to admit the will to probate, constructive notice only being given to absent interested parties. The minors were not represented by guardian ad litem or otherwise. In due time said beneficiary applied for probate of the will in Grant county under section 3790 of the Statutes of 1898. All proceedings required thereby, essential to the jurisdiction of the court, were had, including appointment of a guardian ad litem for such minors. On the hearing an exemplified copy of the will and the record admitting it to probate as aforesaid were produced to the court. The application was denied. On appeal to the circuit court the judgment of the county court was affirmed, upon the sole ground that no guardian ad litem was appointed to represent the minors in the former proceeding. Judgment was entered accordingly, and that seventy-five dollars be paid the contestant's attorneys out of the Emer Gertsen estate.

604 The judgment cannot be affirmed without a judicial repeal of section 3790 of the statutes of 1898. That statute is plain; it is constitutional; it is mandatory. All its provisions up to the decision of the court complained of were fully complied with. Then, whereas the statute says "the will shall have the same force and effect as if it had been originally proved and allowed in the same court," the learned court said otherwise, and such is the effect of the judgment before us.

The mistake was made, it seems, by looking to the essentials of a valid original probate of a will in this state, instead of such essentials in Nebraska. The language of the statute is not to the effect that if it appears that the former probate was

according to the laws of this state the will shall be admitted in the secondary proceeding with like effect as if they were primary; to the contrary it says: "If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction, . . . the will shall have the same force and effect as if it had been originally proved and allowed in the same court."

There is no controversy but what the foreign probate was made by a court of competent jurisdiction. The exemplified copy of the proceedings in that regard is regular in every respect and that is not disputed.

We are unable to see any warrant for the award of seventy-five dollars to the contestant for attorney's fees, and the direction for its payment out of the estate of Emer Gertsen. Respondent's counsel points to chapter 397 of the laws of 1901, to sustain that part of the judgment. It seems the learned court gathered an erroneous idea therefrom. It says: "Any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may . . . allow to the contestant if successful in the circuit court a reasonable attorney's fee out of said estate for services in such contest in said circuit court."

⁶⁰⁵ The first court mentioned refers unmistakably to the one having primary jurisdiction of the probate of wills. It is the court wherein the contest arises, the one of first instance—the county court—that is given authority to allow the attorney's fees and direct the payment thereof out of the estate.

By the COURT. The judgment appealed from is reversed, and the cause remanded, with directions to reverse the judgment or order of the county court, and to render judgment admitting the will to probate, with costs in favor of the proponent, and to remand the matter to the county court with directions to proceed therein according to law.

The Probate of Foreign Wills is considered in the recent notes to Estate of Clark, 113 Am. St. Rep. 211; State v. District Court, 34 Mont. 96, ante, p. 512.

DISCONTO GESELLSCHAFT v. UMBREIT.

[127 Wis. 651, 106 N. W. 821.]

ALIENS—Right to Maintain Action.—All foreigners, *sui juris*, who are not specially disabled by the law of the place where the suit is brought may there maintain suits to vindicate their rights and redress their wrongs. (p. 1066.)

ALIENS—Right to Maintain Action.—If a suit between two nonresident aliens upon a foreign cause of action can be maintained here, not as a matter of right, but only on principles of comity, then auxiliary actions or equitable proceedings in the nature of attachment and execution fall under the same rule, notwithstanding the fact that residents of the state may be parties to the auxiliary actions as stakeholders or claimants of the impounded property. (p. 1067.)

ALIENS—Right to Maintain Action.—An action by one nonresident alien against another one, to redress a wrong committed without the state, is not maintainable here as a matter of right, but only upon principles of comity. (p. 1068.)

COMITY—Its Definition and Principles.—Comity is defined as courtesy, a disposition to accommodate. By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens. (p. 1070.)

ALIEN—Right to Maintain Action to Prejudice of Resident Creditors.—Comity does not allow a foreigner to seize and carry away property within the jurisdiction of our courts when a resident creditor stands also at the bar with his judgment and provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. It makes no difference that his claim may have accrued after that of the foreign creditor; the question is not determined by priority in point of time, but by the situation at the time when the court is called upon to decide which creditor shall receive its aid. (p. 1074.)

ALIEN—Agent of Foreign Trustee in Bankruptcy.—To allow an alien, here nominally in his character as a creditor, but really as the mere agent of a foreign trustee in bankruptcy, to impound property by process of garnishment, is to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property within this state. (p. 1075.)

ALIEN—Right to Maintain Action to Prejudice of Resident Creditors.—A nonresident alien may not sue another alien in the courts of this state for a tort committed in a foreign country, and by means of garnishment or other provisional remedy impound property of the defendant in this state, when one of our own citizens is a creditor of the defendant and has taken subsequent legal proceedings to impound such property for the payment of his claim. (p. 1075.)

GARNISHMENT.—No Lien on a Fund represented only by a negotiable instrument is obtained by an attempted garnishment. (p. 1075.)

JURISDICTION.—In an Action Against a Nonresident, where there is only substituted service of process, the court acquires no jurisdiction for mere purposes of personal adjudication, but only to enter a judgment with reference to or to be enforced upon property within the state, or a judgment concerning the status of one of our own citizens. (p. 1076.)

August C. Umbreit, in propria persona, Joseph B. Doe and Hoyt, Doe, Umbreit & Olwell, for the appellant.

Winkler, Flanders, Smith, Bottum & Fawsett, for the respondent.

654 WINSLOW, J. The two actions above named, the first by way of garnishment and the second by way of creditor's bill to reach nonleviable assets, were consolidated for the purposes of trial, and from a judgment in favor of the plaintiff in each action the defendant Umbreit appeals. The facts in the cases were not in dispute, and were substantially as follows: The plaintiff is a banking corporation of the German empire, having its principal banking-house at Berlin. Gerhard Terlinden, the defendant in the main action, was and is a subject of the German empire. In July, 1901, Terlinden absconded from Germany to this country, and was arrested at Milwaukee, August 16, 1901, as a fugitive from justice in extradition proceedings, which proceedings afterward resulted in his being extradited to Germany. In May, 1901, Terlinden had committed torts in Germany, by which the plaintiff bank had sustained damages amounting to nearly \$100,000, and on August 17, 1901, the plaintiff commenced an action by personal service of a summons upon Terlinden in the Milwaukee circuit court to recover its damages for said torts, and at the same time garnished the First National Bank and the Marine National Bank of said city. The First National Bank answered, admitting the previous deposit by Terlinden of two sums aggregating \$6,420. The Marine National Bank answered, admitting the previous deposit by him of \$5,000, for which it had issued to him a negotiable certificate of deposit in the usual form, which had not been returned. February 19, 1904, the plaintiff recovered judgment in the main action against Terlinden for \$94,105.11. The appellant Umbreit is, and was at all times named, a citizen and resident of Wisconsin, and rendered services for Terlinden beginning August 16, 1901, and ending February

1, 1903, and, on March ⁶⁵⁵ 21, 1904, commenced an action against Terlinden to recover for such services, in which action he obtained service by publication only. At the time of the commencement of such action he also garnished the defendants First National Bank and Marine National Bank. Umbreit obtained judgment against Terlinden in his main action by default on June 11, 1904, for \$7,500 damages; thereupon he intervened in the plaintiff's garnishee action against the First National Bank, and claimed that his lien by garnishment was superior to that of the plaintiff. April 1, 1904, the plaintiff brought an action in equity in the nature of a creditors' bill against Terlinden, the Marine National Bank, John C. Ames, and Umbreit, the object of the action being to aid its lien by garnishment against the Marine Bank, and it demanded judgment that the \$5,000 certificate of deposit, which was in the possession of the defendant Ames, not indorsed, be subjected to the lien of its judgment against Terlinden, and that the claims of Umbreit and the other defendants be cut off. In this action a temporary injunction, preventing the transfer or payment of the certificate of deposit, was issued and served upon the defendants. The defendant Ames surrendered the certificate into court and disclaimed title thereto; the defendant Umbreit answered, setting up his own judgment and garnishment, and claiming that his lien thereby was superior to that of the plaintiff. On or about July 27, 1901, proceedings in bankruptcy were instituted in Germany against Terlinden, and one Hecking was appointed trustee of the estate. On or about August 20, 1901, the plaintiff presented its claim to said trustee in bankruptcy, being the same claim upon which the main action was brought. The main action was commenced with the approval of the trustee, Hecking, and after its commencement the plaintiff agreed with Hecking that all moneys he should recover in the action should form part of the estate in bankruptcy and be handed over to trustee Hecking. ⁶⁵⁶ It appears that the German bankruptcy act contains the following provision (sec. 14): "Pending the bankruptcy proceeding neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors."

The garnishment action against the First National Bank and the bill in equity against the Marine National Bank were

thereupon consolidated and tried together, and the court, upon the above facts, awarded the money in both banks to the plaintiff.

⁶⁵⁷ The general question here presented is whether a non-resident and alien creditor may sue a nonresident and alien debtor in the courts of this state upon a cause ⁶⁵⁸ of action accruing in a foreign country, and may by means of garnishment or other provisional remedy impound property of the debtor within the state, and obtain judgment permitting it to apply such property upon the debt when one of our own citizens is shown also to be a creditor of the alien debtor and to have taken subsequent legal proceedings to impound the property for the payment of his claim. The general rule that all foreigners *sui juris* who are not specially disabled by the law of the place where the suit is brought may there maintain suits to vindicate their rights and redress their wrongs is undoubted: Story on Conflict of Laws, 8th ed., sec. 565; 2 Cyc. 107, 108, art. "Aliens." Resident alien friends are said to have practically the same rights and privileges, so far as the protection by law of their persons, liberty, reputation, and property rights is concerned, as citizens; and to protect these rights they must possess the legal remedies necessary for their due vindication. Alien friends, whether resident or nonresident, also have, in the absence of disabling statutes at least, the right to take, hold, enjoy and dispose of property, real and personal, and to make contracts with residents, and so must have the right to invoke legal remedies to maintain these rights. In both cases the remedies are commensurate with the rights to be protected.

The plaintiff, however, is within neither of these principles. It is a nonresident; it has no property of any kind within the state; it has made no contract within the state or with any resident of the state. It has brought action against another nonresident alien, temporarily within the state, to redress a wrong committed without the state, and it asks the courts of this state not only to give it judgment for that wrong, but also to lend the aid of its process to impound property within the state and satisfy such judgment therefrom to the prejudice of one of the state's own citizens who has a claim against the same debtor. It is true that the cause of action is transitory and the parties both within the jurisdiction ⁶⁵⁹ of the court, and so the court has jurisdiction, and

may doubtless rightly entertain the cause; but is the court compelled to do so, because of an inherent right which the alien has to demand the action of the court; or does it do so upon the principles of comity, with the right to refuse relief when such relief prejudices the interests of resident citizens? This is the initial question in the case, and the one upon which, as it seems to us, it must turn. In considering this question there should be no confusion of ideas as to the exact situation and relation of the various actions and proceedings. It must be kept in mind that the original action is between two non-resident aliens upon a foreign cause of action; the appeals in the present cases are from judgment in two auxiliary actions brought in aid of the main action, to impound property, which actions are, in effect, only proceedings to secure payment of the judgment in the main action by equitable execution upon nonleviable property. Had the property sought to be reached been tangible and leviable in its nature, writs of attachment and execution issued in the main action would have accomplished the same purpose. It is manifest, therefore, that if the main action cannot be maintained as matter of right, but only (if at all) on the principles of comity, the auxiliary actions or equitable proceedings in the nature of attachment and execution must fall under the same rule which applies to the main action out of which they spring, notwithstanding the fact that residents of the state may be parties to the auxiliary actions as stakeholders or claimants of the impounded property. That the main action is not an action maintainable as a matter of right, but only upon the principles of comity, seems unquestionable.

This court has held that a resident of another state may sue another nonresident upon transitory cause of action arising outside of this state, in our courts, as a matter of strict right: *Eingartner v. Illinois S. Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503. This ruling was, however, based solely upon ⁶⁸⁰ that provision of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states": United States Constitution, art. 4, sec. 2. It will be noticed that the present chief justice, though concurring in the result, disagreed with the court in that case upon this question, and took the position that the action could not be maintained, as matter of

right, even under the constitutional provision named, but only upon the principles of comity. It is very manifest that, had the case been one between alien nonresidents, to whom the constitutional provision does not apply, the court would have taken the same view. It is not intended, however, to base the decision of this case upon a mere inference of this nature, nor is it necessary. The principle that an action between nonresident aliens upon a cause of action arising in a foreign country is entertained or not in the courts of this country as the principles of comity may dictate is very well supported. It is said by Mr. Wheaton in his *Elements of International Law* (eighth edition, edited by R. H. Dana), part 2, section 140: "It is the duty as well as the right of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations as to taking cognizance of controversies between foreigners. It may be assumed or declined at the discretion of each state, guided by such motives as may influence its judicial policy."

Mr. Webster, in his argument in the case of *Bank of United States v. Primrose*, 13 Pet. 519, 10 L. ed. 274, defined the doctrine of comity as follows: "It is, in general terms, that there are, between nations at peace with one another, rights, both national and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts, respectively": 6 Webster's Works, 117.

The principle is impliedly recognized in *Mason v. Ship Blaireau*, 2 Cranch, 240, 2 L. ed. 266. This was a libel for salvage upon a French vessel which had been damaged in a collision on the high seas and brought into an American port by a crew put ⁶⁶¹ on her by an English vessel. All the parties were foreigners, and a question as to the jurisdiction of the court was raised, and thus treated by Chief Justice Marshall (page 264): "These doubts [i. e., doubts as to the jurisdiction] seem rather founded on the idea that upon the principles of general policy this court ought not to take cognizance of a case arising entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that whatever doubts may

exists in a case where the jurisdiction is objected to, there ought to be none where the parties assent to it."

It is very manifest that the case was entertained and decided not because the alien parties had a right to demand it, but because considerations of public convenience seemed in that case to require it. Had considerations of public policy, convenience, or the protection of the interests of our own citizens been upon the other side of the question, it seems evident that the court would have refused to exercise its jurisdiction. This is really the principle of comity. It is a question of discretion in the exercise of power, not a question of the existence of the power itself, for that is admitted.

In an early case in New York it was said that while our courts may take cognizance of torts committed on the high seas on board a foreign vessel where both parties are foreigners, still "it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our citizens abroad as well as to foreigners here": *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445. This doctrine was approved in *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564; *Dewitt v. Buchanan*, 54 Barb. 31; *Olzen v. Schierenberg*, 3 Daly, 100; and the doctrine was also held in that ⁶⁶² state to apply to actions between nonresident citizens of other states (*Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949), which, as we have seen, is contrary to the rule in this state as declared in the *Eingartner* case, (94 Wis. 70, 58 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503). The same rule as to foreigners is held in Michigan (*Great Western R. Co. v. Miller*, 19 Mich. 305), where it was said that "where the parties are not residents of the United States and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases": See, also, 7 Am. Law Rev. 417, art. "Suits Between Aliens." The doctrine is reasonable; in fact, any other doctrine would seem to be an anomaly. The laws of a state are enacted primarily for the regulation, benefit, and protection of persons, rights, and property within its jurisdiction. To hold that two foreigners may import, bodily,

a cause of action, and insist, as a matter of right, that taxpayers, citizens and residents shall await the lagging steps of justice in the ante-room while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable, if not absurd.

Holding, therefore, that the main action in the present case, with its equitable auxiliary proceedings to impound nonleviable property, is to be maintained in the courts of this state (if at all) upon the ground of comity rather than upon the ground of right, we are to inquire what the general principles of comity are, and what circumstances in the present case are to be considered in deciding whether the courts of this state should extend their aid to the plaintiff. Comity is defined as: "Courtesy; a disposition to accommodate." By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens. While this court has not had occasion to consider the application of the principles ~~of~~ of comity to an action between nonresident aliens upon a cause of action accruing abroad, like the present, it has passed upon cases involving other phases of the question, and has clearly recognized the principle and its limitations. Thus, in *Mowry v. Crocker*, 6 Wis. 326, this court held that a voluntary assignment of property for the benefit of creditors made in another state passes the title to personal property of the assignor within this state, and will be given full effect by the courts of this state; and this ruling was followed in *Cook v. Van Horn*, 81 Wis. 291, 50 N. W. 893, and recognized in *Segnitz v. Garden City B. & T. Co.*, 107 Wis. 171, 81 Am. St. Rep. 830, 83 N. W. 327, 50 L. R. A. 327, as well as in *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395, 23 L. R. A. 52. But in *McClure v. Campbell*, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 343, it was held that an assignment of property made in another state pursuant to a law which amounts to a state bankrupt law has no extraterritorial effect, and will not be given effect by the courts of this state as to property within this state, and this doctrine has been subsequently approvingly cited in *Filkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79, *Wells, Fargo & Co. v. Walsh*, 87 Wis. 67, 57 N. W. 969, *Hughes v. Hunner*, 91 Wis. 116, 64 N. W. 887, and *Segnitz v. Garden City B.*

& T. Co., 107 Wis. 171, 81 Am. St. Rep. 830, 83 N. W. 327, 50 L. R. A. 327. The vital distinction between the two principles is that in the first case the title to the property passes by act of the owner, which is effective as to personal property wherever situate, while in the second case the assignment is either actually or practically made by decree of the court or operation of law in proceedings in invitum, and hence it has no effect outside of the jurisdiction of the court: See, also, *Smith v. Chicago etc. R. Co.*, 23 Wis. 267. It is well to note, however, that even in the first line of cases, where effect is given to the assignment in this state, the ruling is distinctly based upon the principle of interstate comity, though the principle was not discussed at any length in any of the cases.

In *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395, 23 L. R. A. 52, the ⁶⁶⁴ subject received attention in an opinion written by the late Mr. Justice Pinney, which is valuable and instructive. In this case it appeared that a New York manufacturing corporation had commenced proceedings in the courts of that state for its own voluntary dissolution, and had been adjudged insolvent and dissolved, and all its property, effects, and credits transferred to the defendant Ketcham, as receiver; that in course of the proceedings an order had been made enjoining all creditors of the corporation from commencing or prosecuting any actions against the corporation to collect their debts, which order had been served upon Gilman, who resided in New York; that the New York statute under which the proceedings were brought did not contemplate or provide for a discharge of the debtor, but simply for division of its property among its creditors and stockholders; that, after the injunctive order aforesaid had been made and served, Gilman commenced action in this state against the corporation, and garnished one of its debtors in this state, who brought the money into court, and Ketcham was thereupon interpleaded and made claim to the fund, by reason of the facts above stated. In this case it was held that the effect of the voluntary dissolution proceedings in New York was to place all of the corporate property and assets in custodia legis, to be collected and applied by the receiver; that there was nothing in the proceeding or the statutes of New York in contravention with the law or public policy of this state, and that to give effect to such proceedings would not prejudice the rights of any citizen of this state. On these grounds the claim of the receiver was recog-

nized and upheld upon the principles of comity, as against the plaintiff who was seeking the aid of the courts of this state in violation of the law, and evading the process of his own state. In discussing the question it was said: "Our own citizens, in a proper case, would no doubt be protected against the effect of such extraterritorial act and ~~ess~~ adjudication, if injurious to their interests or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens."

This was not a chance remark, but a careful statement of the principle of comity as applied to the case before the court, and was thoroughly supported by citations of and quotations from the authorities, which need not be repeated here. This case has since been cited with approval in *Hughes v. Hunner*, 91 Wis. 116, 64 N. W. 887; *Parker v. Stoughton M. Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; *Wyman v. Kimberly-Clark Co.*, 93 Wis. 554, 67 N. W. 932; *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; and by the present chief justice in his concurring opinion in *Eingartner v. Illinois S. Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503, where he also says:

"Actions like the one at bar [which was an action by one nonresident against another for a tort committed in Illinois] are generally governed by the principles of interstate comity."

In *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486, it is said in the opinion of Mr. Justice Marshall: "This court recognizes fully the importance of interstate comity and uniformly freely gives effect to it as regards the laws of sister states when it will not seriously violate the policy of our own laws or the rights of our own citizens. . . . A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits": 106 Wis. 276, 82 N. W. 602.

Upon these principles, then, we are to determine whether the plaintiff should be allowed by the courts of this state to take the moneys which it has impounded, and in determining this question a brief reference to the facts at this point will be helpful. Terlinden committed a tort (the nature of which does not appear) against the plaintiff in Germany in May, 1901, and fled to this country, bringing the money in ques-

tion and depositing it in bank. It appears to have been ~~his~~ his own money; at least there is nothing before us to show to the contrary. The intervener, Umbreit, began to render services to Terlinden (the nature of which does not appear) on August 16, 1901, and continued to render services until February 1, 1903, when his bill amounted to \$7,500, which has not been paid. The plaintiff commenced suit against Terlinden to recover damages for said tort August 17, 1901, and obtained judgment for more than \$94,000 February 19, 1904, more than \$85,000 thereof being still unpaid. At the time of commencing suit it garnished the banks. Umbreit brought action against Terlinden in March, 1904, and garnished the banks, obtained service by publication, and was given judgment by default in his main action for \$7,500 June 11, 1904. Terlinden was thrown into involuntary bankruptcy in Germany, July 27, 1901, and the plaintiff has taken part in the proceedings. The German law prohibits the creditor of a bankrupt from seizing the bankrupt's property by attachment or execution pending the bankruptcy proceedings. The plaintiff, after the commencement of its action, agreed with the trustee in bankruptcy that it would hand over all moneys it might recover in the action to the trustee to go into the general estate.

It may be admitted that there is nothing contrary to our laws or public policy in the prosecution of an action by a foreigner against another to recover damages for a tort committed abroad, provided that the legal business of citizens is not materially interfered with thereby. The policy of our laws is to give every man a certain and efficient remedy in the courts for the wrongs which he may suffer. It may be admitted, also, that by the mere prosecution of the action to judgment in the present case no interest of the public nor of any of our citizens was prejudiced. But the plaintiff was not content simply to prosecute his action to judgment. At the inception of his action he asked and obtained the help of the court to seize and hold property of the defendant within ~~the~~ the jurisdiction of the court to answer the demands of its expected judgment. At this very time Terlinden was indebted to Mr. Umbreit, a citizen of our own state, in some amount, and evidently upon a contract for continuous service. There is nothing in the record to impeach the bona fides of that debt or service. Before the plaintiff obtained any judgment on its claim, Umbreit's claim had become large; action

was begun upon it in March, 1904, the same property impounded by garnishment, and in June, 1904, judgment was obtained. Thereupon Umbreit intervened in the plaintiff's garnishment action, and thus the foreigner and the citizen were brought face to face, each demanding the aid of the court in subjecting the funds in bank to the payment of its claim in preference to the other. If the foreigner was entitled to maintain his action and prosecute all the statutory auxiliary remedies as matter of right, his present claim would have to be sustained, because he obtained the prior lien by garnishment (so far, at least, as the funds in the First National Bank are concerned); but being only entitled to ask the help of the court on the ground of comity he must, necessarily, only take such help as the rules of comity will give. It is confidently believed that no court in such case ever has allowed or should allow the foreigner to seize and carry away property within the jurisdiction when a resident creditor stands also at the bar with his judgment and his provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. If such action be not prejudicial to the rights and interests of our own citizens, it is difficult to see what action would be prejudicial. Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor; the question is not to be determined by priority in point of time any more than by priority of garnishment, but by the situation at the time when the court is called upon to finally decide which creditor shall receive its aid. So, if the case were devoid of any other facts, comity would require that the interests of the ~~ees~~ home creditor be protected. But there are other facts which have a material bearing. The foreign creditor is here nominally in his character as a creditor, but really as the mere agent of the foreign trustee in bankruptcy, who could not himself come here and assert any right to the property. The creditor has agreed to hand over to the trustee for general distribution all that he may recover in this action. Thus it is proposed by the aid of our courts to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property within this state. This is certainly imposing upon good nature, and comity is, after all, simply good nature. So we reach the conclusion that so far as the case against the First National Bank is concerned, the

judgment is erroneous and should have been in favor of the intervenor.

As to the equitable action in aid of the garnishment against the Marine National Bank, while the general principles of comity already discussed are equally applicable, there are some further considerations. In this case neither party obtained any lien on the fund by reason of the attempted garnishments, because it was represented only by a negotiable instrument which the bank had issued to Terlinden: Stats. 1898, sec. 2769, subd. 1. The equitable action was, therefore, brought by the plaintiff, to which Umbreit was made a party, in order to reach the indebtedness represented by the negotiable instrument and subject it to any judgment which might be obtained in the main action. At the time this action was brought Umbreit had brought his action against Terlinden, obtained service by publication only, and had attempted to garnish the Marine National Bank, but had obtained no judgment. In the complaint in the equitable action the plaintiff alleged that Umbreit claimed a lien on the instrument by reason of his subsequent garnishment of the bank, but alleged that such garnishment was without validity and without jurisdiction, and therefore prayed that Umbreit's ~~own~~ lien be cut off. Umbreit answered, claiming an indebtedness of Terlinden to him of \$7,500 as aforesaid, and setting up the commencement of his action therefor and his garnishment of the Marine Bank. The court found that Umbreit commenced his action and obtained service by publication only; that he obtained his judgment by default for the full amount claimed, but made no findings as to the merits of Umbreit's claim. The court also found that Umbreit, at the commencement of his suit, served garnishee process on the Marine National Bank, but concluded that, as the only liability of the Marine Bank arose by reason of the issuance of a negotiable instrument to Terlinden, no lien thereon or on the liability of the bank was secured by either plaintiff's or defendant's garnishment proceedings.

There is no bill of exceptions in the case, and hence the findings of fact are solely to be considered, and by them we are only informed that Umbreit obtained judgment by default upon substituted service of the summons, and the question has occurred to us (though not suggested in the briefs) whether such a judgment constitutes any proof that any sum was owing from Terlinden to Umbreit; in other words, is the

judgment itself proof of personal liability, especially when the parties are litigating their rights before a court of equity? The validity and justice of the plaintiff's judgment in the main action cannot be questioned, because it was rendered after personal service of the summons and is unappealed from, but the defendant, Umbreit, has no such judgment and is not found, as matter of fact, to have had any claim against Terlinden, except his judgment obtained by default on substituted service. When he comes into a court of equity and makes his affirmative claim for priority of right in property which the plaintiff had in form equitably impounded and upon which he (Umbreit) had no actual lien, must there not be a finding that he actually had a just claim in order to justify the court in protecting him? Is his judgment any ⁶⁷⁰ proof of his claim against Terlinden, except as to property garnished or attached? The principle is familiar and well settled that in an action against a nonresident, where there is only substituted service of the summons, the court acquires no jurisdiction for mere purposes of personal adjudication, but only to enter a judgment with reference to or to be enforced upon property within the state or a judgment concerning the status of one of our own citizens: *Moyer v. Koontz*, 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. The judgment in such action will, of course, be effective so far as it affects or may be enforced against the property of the defendant which has actually been seized by attachment or garnishment. It has also been held by this court, contrary to the rulings in some jurisdictions, that it is not essential that the property within the state be seized by writ of attachment, but that, if the facts required by the statute to authorize the order for publication appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it had not been removed from the state or sold to an innocent purchaser before the rendition of the judgment: *Jarvis v. Barrett*, 14 Wis. 591; *Gallun v. Weil*, 116 Wis. 236, 92 N. W. 1091. But it was further held, prior to the passage of chapter 29 of the laws of 1868 (Tay. Stats., c. 124, secs. 13-15), that the property within the state must be specifically described in the moving affidavit upon which the order of publication is based or the court will acquire no jurisdiction: *Winner v. Fitzgerald*, 19 Wis. 393. The prop-

erty so described need not be property which can be attached, but may be such property which can only be reached by creditors' bill, such as debts owing by a resident to a nonresident, and it is now sufficient if it be described in the complaint: *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

The act of 1868, above named, as codified by subdivision 1, section 2639 of the Revised Statutes of 1878, added a new class of cases in which service by publication was authorized, namely, cases where ⁶⁷¹ the cause of action arose in this state and the court has jurisdiction of the subject of the action. In *Witt v. Meyer*, 69 Wis. 595, 35 N. W. 25, this court expressed a grave doubt whether, in such case, the court would obtain any jurisdiction either of person or property unless it also appeared by the affidavit that the defendant had property in this state which was described; citing, in addition to *Jarvis v. Barrett*, 14 Wis. 591, *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269, and *Jones v. Spencer*, 15 Wis. 582. Just previous to this decision it had been held, in *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477, that a foreign personal judgment founded alone upon service of process outside of the jurisdiction, there being no property within that jurisdiction, was absolutely void; citing *Jarvis v. Barrett*, 14 Wis. 591. In view of the doctrine announced by the supreme court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, which is a leading case on this subject, and which was cited with approval by this court in *Moyer v. Koontz*, 103 Wis. 22, 74 Am. St. Rep. 837, 79 N. W. 50, we think it must be considered as settled that the doubt expressed in *Witt v. Meyer*, 69 Wis. 595, 35 N. W. 25, was well founded, and that such judgments, except those affecting the status of a citizen, can go no further than to be effective as to property within the state at the time of the commencement of the action, which property must be described in the moving papers. Now, it does not appear in the findings in the present case that the debt from the Marine Bank to Terlinden was named or described in the papers upon which the order of publication was based. It is true that it appears that judgment was entered in the action, and it may be claimed that the presumption of regularity in the proceedings of a court of general jurisdiction should be indulged in. The difficulty with this claim is that it appears that Mr. Umbreit did have a valid garnishment of the funds in the First National Bank, which he acquired at the time he

commenced his suit, and this would fully justify the court in entering the formal judgment in the main action, so the office of any presumption seems very doubtful at best.

We conclude that in the case of the creditors' bill against ~~the~~ the Marine Bank the mere finding that a judgment was obtained by Umbreit by default upon substituted service is insufficient to authorize this court to hold that any jurisdiction was obtained of the debt due from the bank, because it does not appear affirmatively that in that action this property was described in the affidavit or complaint on which the order of publication was based. In view of the fact that this point seems to have been overlooked in the trial of the case, judgment will not be directed here, nor, on the other hand, will a new trial of the case be ordered. The Marine Bank case will be sent back with directions to allow the defendant Umbreit to introduce proof showing that the debt due from the Marine Bank was properly described in the affidavit or complaint upon which the order for publication was based, in which event his judgment will be given preference over the plaintiff's claim to the full amount thereof; in case, however, such was not the fact, he should be allowed to introduce extrinsic evidence of the amount justly and equitably due him, and the plaintiff should be allowed to meet such claim by evidence to the contrary, and the amount found by the court to be justly due Mr. Umbreit over and above what he may actually realize from the judgment in the garnishment action should be given preference, after which the plaintiff's claim should be allowed.

By the COURT. The judgments in both actions are reversed, with costs. The garnishment action is remanded, with directions to render judgment for the defendant, Umbreit, that he recover the sum garnished, with costs. The equitable action is remanded to take further proof, and for judgment in accordance with the opinion.

Cassoday, C. J., Dissented, and said: "I briefly state the grounds of my dissent in this case. It seems to be well established that one alien may sue another alien in the state courts upon contract made abroad or for a tort committed in a foreign country, if the defendant is transiently in the state and service is had upon him as in the case at bar: 2 Am. & Eng. Ency. of Law, 2d ed., 66, 67; 2 Cyc. 105-107. This seems to be conceded. Such right to maintain suits in the state courts, however, is of little or no value unless the plaintiff in

such action is entitled to the remedies given to domestic creditors. And so, 'by comity and the laws of the states, resident aliens have the right to the same remedies in courts as citizens, and no court will deny those rights without positive legislation taking them away'; and this rule applies to all personal actions: 2 Cyc. 107, 108. Of course the *lex fori* governs in all matters relating to the remedy and the course of procedure: 22 Am. & Eng. Ency. of Law, 2d ed., 1383.

" 'The right to proceed by process of attachment has been limited by the statutes of some of the states to a citizen of the state or to a citizen of some other of the United States. As a rule, however, at the present time this right is not ordinarily affected by the question of citizenship, and it is generally immaterial that the attaching creditor is a nonresident': 4 Cyc. 406.

" 'Where the statutory grounds for the issuance of the writ of garnishment exist, the proceedings may be instituted against all persons, both individual and corporate, and irrespective of whether they are residents or nonresidents, unless, of course, they enjoy some special immunity from suit. The statutes authorizing the issuance of writs of garnishment are, as a rule, very broad in regard to the persons who may take advantage of the process, and generally provide for its issuance on the application of any person; and the word "person," as so used, has been held to include all individuals, nonresidents as well as residents, corporations, and sovereignties': 14 Am. & Eng. Ency. of Law, 2d ed., 752.

" 'Since, as a general rule, the garnishing creditor acquires no greater right in the property or credits in the hands of the garnishee than that possessed by the defendant at the time of the service of the writ of garnishment, a prior valid sale or assignment or lien or encumbrance thereon will take precedence over a subsequent garnishment. On the other hand, as the garnishing creditor succeeds to all the rights and interests of the defendant at the service of the writ, the rights of the garnishing creditor are not affected by any alienation by the defendant or encumbrance created or arising subsequently to the service of the writ': 14 Am. & Eng. Ency. of Law, 2d ed., 867.

" 'The same is true as to attachments: 4 Cyc. 632. Our statutes give the right of garnishment in broad terms, and extend to actions 'to recover damages founded upon contract, express or implied,' and extend to cases where 'the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought' and to cases where the 'defendant is a foreign corporation' or a nonresident: Stats. 1898, secs. 2731, 2753. This court has repeatedly held that proceedings by garnishment or creditors' bill to reach non-leviable assets are, in effect, an equitable levy from the time of service of process: *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. 153; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919. It follows from what has been said that the plaintiff was properly allowed to maintain this action against Terlinden for the tort

committed by him in Germany in May, 1901, and since personal service was had upon him in Milwaukee August 17, 1901, and the First National Bank of Milwaukee garnished on that day, the funds in the bank were subject to garnishment, and the plaintiff by such garnishment obtained an equitable lien upon the funds deposited in the bank August 14, 1901.

"The fact that the plaintiff obtained judgment against Terlinden February 19, 1904, for a large amount, and that judgment never having been appealed from, would seem to conclusively establish the right of the plaintiff to maintain this action against Tenderlin. The plaintiff having the right to maintain this action against Tenderlin, then, unless there is some law to the contrary, or the plaintiff is precluded by the bankruptcy proceedings in Germany, it would seem that he also had the right to maintain garnishment proceedings against the bank. The plaintiff here is acting in harmony and co-operating with the German trustee and the German consul at Chicago for the benefit of all the creditors of Terlinden and not in violation of the clause of the German bankrupt act quoted in the opinion filed. The whole purpose of that provision, as I understand, was to prevent one creditor by such attachment or execution from obtaining a preference over other creditors in the courts of Germany. Here, in defiance of comity, it is invoked to give an American creditor preference over all German creditors, and on a claim which had no existence when the bankruptcy proceedings were instituted, but accrued afterward. Besides, that provision, as I understand, relates wholly to the remedy for proceedings in Germany. The remedies here given by our courts are, as I understand, given and regulated entirely by our statutes, and not by the statutes of Germany. The provision quoted does not go to the right of action but to the remedy merely. Terlinden is here adjudged to have fraudulently obtained from the plaintiff the money here sought to be reached by garnishment. The right of action has been adjudged to be in the plaintiff. According to the judgment Tenderlin had no defense. There is no attempt on the part of the plaintiff to obtain a preference over other creditors of Tenderlin. On the contrary, and as the appellant claims, the plaintiff was acting in harmony with the trustee and for the benefit of all the creditors. Should the appellant's claim which accrued subsequently to the bankruptcy proceedings be allowed, it would to that extent defeat the bankruptcy proceedings and give a preference to an American creditor over all German creditors. It is true that the rule of comity does not hold courts down to strict legal or treaty obligations. But it requires states or nations to give effect to foreign laws and judicial proceedings, not so much—in the language of Mr. Justice Story—as 'a matter of comity or courtesy as a matter of paramount moral duty': Story on Conflict of Laws, 32. It is not only a friendly courtesy but a mutual courtesy, which requires the courts of the one state or country to do what the courts of the other states or country would

be expected to do under similar circumstances. Here the domestic creditor is allowed to supersede and set aside an equitable lien obtained long before the claim of the domestic creditor accrued, and upon the sole ground that the garnishing creditor is an alien. Should a Wisconsin citizen embezzle the funds of another Wisconsin citizen and then abscond to Germany, and the Wisconsin creditor pursue him to that country and obtain personal service upon him by proceedings in the courts of that country, and then attach or garnish the funds so embezzled, it would hardly be expected that a German court would allow the lawyer whose claim accrued after such attachment or garnishment, in resisting the same, to supersede such attachment or garnishment and obtain the funds so embezzled for his remuneration in performing such service. If it did we would hardly recognize it as an act of comity or courtesy to an American citizen or American law, much less 'as a matter of paramount moral duty.'

"In my opinion the judgment should be affirmed in this case and modified in the other, according to the rights of the parties under the creditors' bill."

"WINSLOW, J. Upon motion for rehearing in these cases our attention was called to article 1 of the treaty concluded between the United States and the kingdom of Prussia in 1828, which reads as follows: 'There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.'

"Attention is also called to a provision in the treaty of 1799 between the same parties as follows: 'Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land.'

"We have been unable to see that either of these treaty provisions has any bearing on the questions in controversy here.

"By the COURT. Motion denied."

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- *The Jurisdiction of Courts over Aliens* is considered in the notes to *Molyneux v. Seymour*, 76 Am. Dec. 665; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 532. The prosecution of transitory actions in a foreign country is discussed in the note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 869.

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ALIENS.

1. **ALIENS—Right to Maintain Action.**—All foreigners *sui juris* who are not specially disabled by the law of the place where the suit is brought may there maintain suits to vindicate their rights and redress their wrongs. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

2. **ALIENS—Right to Maintain Action.**—If a suit between two nonresident aliens upon a foreign cause of action can be maintained here, not as a matter of right, but only on principles of comity, then auxiliary actions or equitable proceedings in the nature of attachment and execution fall under the same rule, notwithstanding the fact that residents of the state may be parties to the auxiliary actions as stakeholders or claimants of the impounded property. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

3. **ALIENS—Right to Maintain Action.**—An action by one nonresident alien against another one, to redress a wrong committed without the state, is not maintainable here as a matter of right, but only upon principles of comity. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

4. **ALIEN—Right to Maintain Action to Prejudice of Resident Creditors.**—Comity does not allow a foreigner to seize and carry away property within the jurisdiction of our courts when a resident

creditor stands also at the bar with his judgment and provisional lien, and thus force such resident creditor to go to a foreign country to collect his debt. It makes no difference that his claim may have accrued after that of the foreign creditor; the question is not determined by priority in point of time, but by the situation at the time when the court is called upon to decide which creditor shall receive its aid. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

5. **ALIEN—Agent of Foreign Trustee in Bankruptcy.**—To allow an alien, here nominally in his character as a creditor, but really as the mere agent of a foreign trustee in bankruptcy, to impound property by process of garnishment, is to set at naught the policy of our own law to the effect that a foreign trustee or receiver in involuntary bankruptcy proceedings obtains no title to the debtor's property within this state. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

6. **ALIEN—Right to Maintain Action to Prejudice of Resident Creditors.**—A nonresident alien may not sue another alien in the courts of this state for a tort committed in a foreign country, and by means of garnishment or other provisional remedy impound property of the defendant in this state, when one of our own citizens is a creditor of the defendant and has taken subsequent legal proceedings to impound such property for the payment of his claim. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

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APPEAL AND ERROR.

In General.

1. **APPEAL.**—Counsel for the Appellant cannot Complain in the supreme court of a ruling concerning the admissibility of evidence made by the district court, when he assumes a position in the supreme court exactly the reverse of that which he assumed in the district court. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

2. **APPEAL—Presumption.**—If the record shows that a paper was placed in evidence, it must be presumed on appeal that its contents were made known to the jury on the trial. (Ark.) *Arkansas etc. Ry. Co. v. Dickinson*, 54.

3. **APPEAL—Record on—Date of Proceedings.**—If the record on appeal states that the hearing began on a certain day, and each successive step in the proceedings, including the settling and signing of the bill of exceptions, is introduced by the term "thereupon," without naming any other date, it must be inferred that each step followed the other without delay, and that all occurred on the date of the hearing. (Kan.) *Humbarger v. Humbarger*, 204.

4. **PRACTICE—Harmless Error.**—Error in overruling a demurrer is harmless if the pleading assailed is thereafter amended, and

the case submitted and determined on the amended pleadings. (Neb.) *Brown v. Brown*, 568.

Exceptions.

5. APPEAL AND ERROR—Waiver of Exception by Failure to Argue.—Where the brief of the appellant merely calls the attention of the appellate court to the refusal of the trial court to give certain requested charges, such court will assume that it is not expected to give attention to such requests. (Mich.) *Greenman v. O'Riley*, 466.

6. APPELLATE PRACTICE—Exceptions must be overruled unless they affirmatively show, without the aid of extrinsic evidence, not only that the ruling was wrong, but that the person complaining was aggrieved, so that if the ruling would be justified or would be harmless to the complainant upon any possible but not impossible situation unexplained by the exceptions, the doings below will not be disturbed or condemned. (Me.) *Purinton v. Purinton*, 309.

7. APPELLATE PRACTICE—Exceptions—Finding of Facts.—If the bill of exceptions on an appeal, or abstract of record in lieu thereof, discloses no objections or exceptions to the failure of the trial court to make a finding of facts, the trial court was not in error in failure to make such finding, especially when it is admitted by the appellant that there was no dispute about the facts. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

Bill of Exceptions.

8. APPELLATE PRACTICE—Bill of Exceptions—What Must State.—An excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the bill of exceptions to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. It is not enough that the court can find these characteristics by studying the report of the evidence in support of the motion for a new trial when it accompanies the bill of exceptions, unless it is made part thereof. (Me.) *Jones v. Jones*, 328.

9. APPELLATE PRACTICE—Bill of Exceptions.—If a bill of exceptions itself recites that certain evidence and rulings are attached to and made a part of such bill, and they are so plainly identified that no doubt can exist that they were settled by the court as part of the bill of exceptions, they may be considered on appeal as such. (Kan.) *Humbarger v. Humbarger*, 204.

Judgment and Reversal.

10. APPEAL—Judgment by Appellate Court.—The supreme court, on reversing a judgment for the plaintiff, and setting aside the verdict for the insufficiency of the evidence and the refusal of the trial court to direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for the defendant, if injustice will not thereby be done. (W. Va.) *Ruffner v. Dutchess Ins. Co.*, 924.

11. APPEAL AND ERROR—Reversal of Judgment.—In case of a motion for the direction of a verdict at the close of the evidence being denied and a verdict being rendered for the adverse party, and its being held upon appeal that the motion should have been granted, and for reasons necessarily precluding the losing party from securing any different result by another trial than the one that would have necessarily followed a correct decision of the motion in

the first instance, this court may cause the litigation to be terminated in the court below without a new trial, to that end remanding the cause with directions to grant the motion previously denied, and to render judgment accordingly. (Wis.) *Hay v. City of Baraboo*, 977.

12. APPEAL AND ERROR—Remanding Cause for Trial on the Merits Though the Judgment Appealed from was not Erroneous.—If a judgment is entered in the trial court for the defendant because of defects in the plaintiff's pleading, where it is infected with duplicity, the appellate court may, in Maryland, in its discretion, remand the cause for trial on the merits. (Md.) *Milske v. Steiner Mantel Co.*, 354.

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ASSAULT.

1. ASSAULT on Innocent Person Supposed to be an Assailant.—

If a person, while apprehensive of an attack from A, strikes B, when he has reasonable grounds to believe that B is A, and when he further believes that it is necessary, in the exercise of a reasonable judgment, to strike A in order to defend himself from a threatened attack by A, using no more force than is necessary, or appears necessary to him, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it is his duty to exercise the highest degree of care practicable under the circumstances to ascertain whether the one whom he is about to strike is in fact the one from whom he apprehends danger; it is not enough that he exercises "due" or "ordinary care and diligence." And if he recklessly and wantonly strikes B, he is liable in exemplary as well as compensatory damages. (Ky.) *Crabtree v. Dawson*, 243.

2. ASSAULT—Whether Excusable.—An instruction in an action for assault and battery is objectionable, if it specifically calls the attention of the jury in detail to the facts testified to by the defendant, and relied on to excuse his conduct. (Ky.) *Crabtree v. Dawson*, 243.

ASSIGNMENTS.

1. ASSIGNMENTS—Accounts not Yet Due.—An absolute assignment of an account not yet due does not constitute a mere covenant to pay out of the fund, even if the assignor therein agrees to act as agent of the assignee in collecting the money. (N. J. Eq.) *Cogan v. Conover Mfg. Co.*, 629.

2. ASSIGNMENTS—Money not Yet Due.—An equitable assignment of money to be earned operates upon the fund as soon as it is earned. (N. J. Eq.) *Cogan v. Conover Mfg. Co.*, 629.

3. ASSIGNMENTS of Accounts not Yet Due.—If a manufacturer assigns as collateral security for his debt the first payment on a contract for two implements to be made by him, and one of the implements is substantially completed and delivered to the purchaser prior to the appointment of a receiver for the manufacturer, and the price is subsequently paid to such receiver, the assignee is entitled to such fund so far as necessary to pay the debt secured. (N. J. Eq.) *Cogan v. Conover Mfg. Co.*, 629.

4. ASSIGNMENTS—Notice to Debtor.—As between the assignor and assignee and those standing in the shoes of the assignor, notice of the assignment to the debtor or holder of the fund is not necessary. (N. J. Eq.) *Cogan v. Conover Mfg. Co.*, 629.

ATTACHMENT.

1. JURISDICTION.—In Attachment Cases the Levy Takes the Place of the Service. Where there has been no step taken to acquire jurisdiction of the defendant's person, and he has not submitted himself to the jurisdiction of the court, it is without jurisdiction to render judgment, unless there has been a legal seizure of property owned by him within the jurisdiction of the court, and then only after a legal return of such seizure has been duly entered. (Ga.) *Albright-Pryor v. Pacific Selling Co.*, 108.

2. ATTACHMENT—Amendment of Entry of Levy.—If an attachment is levied on personal property, the entry of such levy is amendable, but the amendment does not relate back so as to render a judgment previously entered valid. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

3. ATTACHMENT—Jurisdiction to Enter Judgment in Must be Acquired Before the Return Term.—The subsequent issuing and return of summons in garnishment cannot give validity to a judgment if there had been no seizure of the property of the defendant before the return term, and jurisdiction had not been otherwise acquired. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

4. A JUDGMENT or Attachment Against a Nonresident When the Return of the Levy Does not Show to Which of the Defendants the Property Belongs is without jurisdiction and void. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

5. ATTACHMENT, Levy of Must Show on Whose Property It is. It is essential to the validity of an attachment against a nonresident that the entry of the levy show that the property was levied on as the property of the defendant in the attachment, and when there are two or more defendants, the entry must show to which of them such property belonged. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

See Garnishment.

ATTORNEY AND CLIENT.

1. ATTORNEYS' LIENS—Action to Enforce.—A statute creating a lien upon causes of action in favor of attorneys at law, and requiring defendants in such actions after due notice of such lien, to respect it, does not deprive a defendant of the right to settle his suit, but it does require him, in making such settlement, to take into consideration the existence of such lien, and if he ignores it and settles the suit without the consent of the attorney, he is liable in a separate action at law brought by such attorney, for

the amount of such lien. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

2. **CONSTITUTIONAL LAW—Attorneys' Liens—Right to Contract.**—Statute simply creating a lien upon causes of action in favor of attorneys at law, and requiring defendants in actions, after due notice of such lien, to respect it, is not unconstitutional as restricting or destroying the defendant's right to contract. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

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BAIL.

See Recognizance.

BANKRUPTCY.

1. **BANKRUPTCY—Preferential Payment, What not.**—When a creditor receives payment without reasonable cause to believe his debtor insolvent, or that he intended to give a preference, although the facts in the possession of the creditor are such as would naturally produce in the mind of a reasonably intelligent man a doubt or raise a suspicion of solvency, and such as would put a reasonably prudent man upon inquiry, the payment is not preferential. (Wis.) *Suffel v. McCartney National Bank*, 1004.

2. **BANKRUPTCY—Preferential Payment—Belief of Creditor.**—To have reasonable cause to believe that a trader or merchant is unable to pay his debts as they become due in the ordinary course of business is a very different thing from having reasonable cause to believe that the aggregate amount of the debtor's available property and assets is insufficient in amount, at a fair valuation, to pay his debts. (Wis.) *Suffel v. McCartney National Bank*, 1004.

3. **BANKRUPTCY—Preferential Payment—Question of Fact.**—Whether a creditor in receiving a payment had reasonable ground to believe that a preference was intended is a question of fact determinable by the jury or trial court. (Wis.) *Suffel v. McCartney National Bank*, 1004.

4. **BANKRUPTCY—Conversion of Mortgaged Property—Demand.** In an action to recover mortgaged property transferred in fraud of the bankruptcy act, when such property has been converted before the commencement of the action and its proceeds applied to the mortgage indebtedness due the defendant, no demand for its return is necessary. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

5. **BANKRUPTCY—Recovery of Unlawful Preferences—Filing of Claims.**—If a trustee brings an action to recover unlawful preferences made by the bankrupt in fraud of the bankruptcy act, it is not necessary for him to allege in his complaint that any creditor has filed a claim in the bankruptcy proceeding, or any fact showing that it was necessary to recover the alleged preference. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

6. **BANKRUPTCY—Illegal Preferences.**—In an action by a trustee in bankruptcy to recover the proceeds of property alleged to have been transferred in fraud of the bankruptcy act, the question as to whether there was one or more classes of creditors, and in what manner the property sought to be recovered would be administered,

does not vary the legal rights of the trustee to recover the property. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

7. BANKRUPTCY—Jurisdiction of State Courts.—State courts have jurisdiction to litigate questions arising between a trustee in bankruptcy and any adverse claimant concerning transfers of property claimed to have been made in fraud of the national bankruptcy act. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

8. BANKRUPTCY—Unlawful Preferences—Conversion—Trover.—If a transfer of property in fraud of the national bankruptcy act consists in carving out an interest in the property and transferring it by means of a chattel mortgage, and the bankrupt then sells the mortgaged property to a third person subject to the mortgage, such third person then valuing the mortgage interest and delivering it to the mortgagee in notes which are subsequently paid, such notes are not property obtained by the mortgagee, but instruments by means of which the mortgage interest is transferred to him in the form of money, and such transactions constitute a wrongful conversion of the property to the extent of such mortgage interest for the recovery of the proceeds of which trover will lie at the suit of the trustee in bankruptcy. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

9. BANKRUPTCY—Unlawful Preference—Notice of Insolvency. If a chattel mortgage is claimed to have been given to create a preference in fraud of the provisions of the national bankruptcy act, the question of the knowledge of the mortgagee of the mortgagor's insolvency at the time of the execution of the mortgage is one of fact, and such mortgagee is chargeable with notice of all facts which a reasonable inquiry in view of the circumstances with respect to the mortgagor's financial condition, or which were brought home to him, might fairly be expected to disclose. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

10. BANKRUPTCY—Unlawful Preferences—Notice of Insolvency.—If a creditor receives security for the payment of his claim, with knowledge, or reasonable means of knowledge, of the insolvency of the debtor at the time, and that is followed within four months by the commencement of proceedings in bankruptcy against or on the part of the debtor, the intention of such security being to give the favored creditor a preference, and yet have the same standing as other creditors for the balance of his claim, as he would have if the transaction were valid, the effect thereof is to give such creditor an undue advantage and preference within the meaning of the national bankrupt act. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

11. BANKRUPTCY—Conflicting Actions.—If a trustee in bankruptcy brings an action to recover from a guilty agent the value of property wrongfully converted by the debtor, this is not a bar to an action by such trustee to recover the value of the same property from the guilty principal, when both actions are commenced on the theory that such property was converted in fraud of the bankruptcy act. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

12. BANKRUPTCY—Unlawful Preferences—Recovery.—A trustee in bankruptcy acting for creditors in an action to recover unlawful preferences made by the debtor is not entitled to recover money paid him by mistake, and by him paid over to the person holding such preferences, when such money is no part of the bankrupt's assets. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

13. BANKRUPTCY—Unlawful Preferences—Lien Claims.—In an action brought by a trustee in bankruptcy to recover the value of

property of the debtor wrongfully converted in fraud of the bankruptcy act, he is not entitled to recover money realized by the person holding such property in the enforcement of lien claims thereon. Such money is a mere realization by such person of his interests in the property paramount to the rights of the trustee, and not in violation of the bankrupt act governing unlawful preferences. (Wis.) *Jackman v. Eau Claire National Bank*, 955.

See Aliens, 5.

BANKS AND BANKING.

1. BANKS AND BANKING—Unaccepted Checks as Assignment of Deposit.—An unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment, in law or equity, of any part of the drawer's deposit in bank. (Kan.) *Clark v. Toronto Bank*, 173.

2. BANKS.—The Relation Between a Bank and Its Depositors is that of Debtor and Creditor. The money deposited becomes the absolute property of the bank, and as it is merely the debtor of the depositor, it has no lien on his deposit for the purpose of securing a debt due to it from him, though it may have the right to set off the one against the other. (Ga.) *Davenport v. State Banking Co.*, 68.

3. A BANK Does not Owe to the Surety of an Indebtedness in Its Favor the Duty of exercising its right to set off a sum due from it to the depositor against the indebtedness of such depositor to it which the obligation of surety has created. (Ga.) *Davenport v. State Banking Co.*, 68.

4. BANKING—Surety, Duty of Bank to Apply Deposit to the Satisfaction of Indebtedness Secured by.—If a bank holds the note of one of its depositors with a surety, it owes no duty to the surety to apply to the satisfaction of such note a sum due by it to the depositor on his general deposit account, and hence such surety remains liable notwithstanding he demands that such application be made, and the bank refuses to make it. (Ga.) *Davenport v. State Banking Co.*, 68.

5. BANKS AND BANKING—Payment by Check.—If a bank holding a note for collection delivers it to an indorser on the day of maturity in exchange for such indorser's check on another bank, and after inquiring by telephone of the drawee bank about the check, and being informed, through mistake, that it would be paid, enters the amount to the credit of the owner of the note, and on the next day payment of the check, which was at no time good, is refused for want of funds, and the collecting bank delivers it to the drawer, and immediately recovers possession of the note, these transactions do not constitute payment of the note. (Kan.) *Interstate National Bank v. Ringo*, 176.

6. BANKS AND BANKING—Note Held for Collection—Acceptance of Worthless Check—Liability of Bank.—If a bank, holding a note for collection, surrenders it to the maker in exchange for his worthless check upon another bank, and upon the dishonor of such check regains possession of the note as a subsisting obligation against all persons in interest, with no actual prejudice to the owner of the note from the transaction, which takes place after banking hours of one day and before their opening on the next day, no liability is created against the collecting bank in favor of the owner of the note. (Kan.) *Interstate National Bank v. Ringo*, 176.

7. BANKS AND BANKING—Collections—Provisional Credit.—If a note or draft is sent by one individual or bank to another bank to collect, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of creditor and debtor, and having received the note or draft for collection, the collecting bank does not owe the amount thereof to the sender until collected, and though it may credit him in its books therefor, such credit may be treated as provisional, and if the paper is afterward dishonored, it may cancel the credit. (Kan.) *Interstate National Bank v. Ringo*, 176.

8. BANKS AND BANKING—Collections—Erroneous Credit to Owner of Note—Liability of Bank.—If a bank holding a note for collection surrenders it to the maker in exchange for his worthless check on another bank, and upon the dishonor of such check immediately regains possession of the note as a subsisting obligation against all interested parties, no liability arises against the collecting bank in favor of the owner of the note from the facts that upon being orally promised payment by mistake on the part of the bank on which such check is drawn, it gives such owner credit for the amount, mails him a statement to that effect, adding that the credit is subject to collection, and gives him notice of the dishonor of the check early in the morning of the next day after the credit is extended. (Kan.) *Interstate National Bank v. Ringo*, 176.

BATHHOUSE-KEEPER.

BATHHOUSES and Bathing Establishments, Liability of Keepers of.—The proprietor of a bathing establishment who receives from his patrons a sum demanded for the privilege of the bath and assumes the custody of their wearing apparel while they are bathing, is a voluntary custodian for profit, and bound to exercise due care to guard against the loss of theft by others having access to his establishment by his permission. He is a bailee for hire and bound to exercise ordinary care, and liable for his failure to do so. (Ga.) *Walpert v. Bohan*, 114.

BENEFIT ASSOCIATIONS.

1. BENEFIT SOCIETY—Change of Beneficiaries—Waiver of Irregularities.—A waiver by a mutual benefit association of a non-compliance with its by-laws by a member in changing his beneficiaries must, to be effective, occur during his lifetime; but if such death of the insured, take advantage thereof. (Mont.) *Knights of Maccabees v. Sackett*, 532.

2. BENEFIT SOCIETY—Right to Change Beneficiaries.—A member of a mutual benefit association may change his beneficiaries; but, as a rule, to which there are exceptions, he must proceed in accordance with the regulations contained in the policy and by-laws, and any material deviation therefrom will invalidate the transfer. (Mont.) *Knights of Maccabees v. Sackett*, 532.

3. BENEFIT SOCIETY—Change of Beneficiaries—Where not Effected.—If the by-laws of a benefit association provide that a change of beneficiaries takes effect upon a delivery to the local record-keeper of a written request for a change, and a member deposits his application for a change in the mail, the change is not effected if he dies before the delivery of the mail to the record-keeper. By making the mail his agent, he assumes the risk of such

a failure of or delay in the delivery of his request as will prevent its becoming effectual. (Mont.) *Knights of Maccabees v. Sackett*, 532.

4. **BENEFIT SOCIETY—Change of Beneficiaries—When not Effected.**—Where the by-laws of a benefit association provide that a change of beneficiaries takes effect upon a delivery to the local record-keeper of a written request for a change, and a member deposits such a request in the mail, which does not reach the post-office to which it is destined until after his death, though it is actually delivered on the day of such death only a few hours after its occurrence, the contemplated change does not affect the rights of the original beneficiary. (Mont.) *Knights of Maccabees v. Sackett*, 532.

BILL OF EXCEPTIONS.

See Appeal and Error, 8, 9.

BILL OF PARTICULARS.

See Pleading, 4.

BILLS AND NOTES.

Delivery.

1. **BILLS AND NOTES—Delivery.**—A note does not become a liability until delivery. (Me.) *Jones v. Jones*, 328.

2. **BILLS AND NOTES—Delivery to Agent—Death of Maker.**—If the maker of a note places it in the hands of a third person merely for delivery to the payee, such third person is the agent of the maker, and not of the payee, and if the maker dies before delivery by the agent, his authority is thereby revoked and a subsequent delivery by him is ineffectual to create a liability. (Me.) *Jones v. Jones*, 328.

3. **BILLS AND NOTES—Delivery on Happening of Contingency—Burden of Proof.**—If a note is left with a third person to be delivered to the payee upon the happening of a contingency, the first delivery is complete and irrevocable, but the burden of proving such delivery is upon the person setting it up. (Me.) *Jones v. Jones*, 328.

Payment.

4. **BILLS AND NOTES—Payment to Unauthorized Person.**—The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized, the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. This rule applies generally to all negotiable paper, independently of the existence of any mortgage or other security. (Wis.) *Marling v. Nonamensen*, 1017.

BONDS.

See Constitutional Law, 5.

BROKERS.

1. **BROKER—When Earns Commission.**—If the owner of land agrees to pay a broker a percentage of the price for which the property shall be sold to any purchaser produced by him, the broker earns his commission if he produces a customer to whom the principal in fact sells. (Wis.) *Bowe v. Gage*, 1010.

2. BROKER—Instruction in Action for Commission.—In an action by a real estate broker to recover his commission, an instruction that "where a sale is effected through the efforts of a real estate agent or through information derived from him so that he may be said to be the procuring cause, his services are regarded in law as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of his commission rather than the contrary," is erroneous, as suggesting that real estate agents are more meritorious or entitled to more favor than people in other walks of life. (Wis.) *Bowe v. Gage*, 1010.

3. BROKER—Fraudulent Settlement by Principal.—If the owner of land agrees to pay a broker a percentage of the selling price for which the property shall be sold to any purchaser produced by him, and subsequently the principal represents that he has decided to keep the land, and induces the broker to accept a small sum in full for his services, whereupon the principal himself sells to a customer previously introduced by the broker, the broker, when he sues for his commission, is entitled to retain the amount paid, subject only to an equity in favor of the principal that, if the broker shows himself entitled to recover by reason of a performance of his contract, such payment shall be applied thereon. If this application is offered by the complaint, and made by the judgment, this is in practical effect a return of the money. (Wis.) *Bowe v. Gage*, 1010.

BUILDING CONTRACT.

See Contracts, 3-8.

CANCELLATION OF INSTRUMENTS.

EQUITY JURISDICTION—Mistake—Cancellation of Deed.—If a grantor gives a warranty deed of land which he does not own, under the mistaken belief that he has title thereto, equity will not cancel the deed when there is no fraud, falsehood, misrepresentation or concealment on the part of such grantor. (Me.) *Bibber v. Carville*, 303.

CARRIERS.

Connecting Carriers.

1. CARRIERS, Connecting, Presumption as to the One on Whose Line Damage Occurred.—Where goods are transported by successive carriers, and an action is brought to recover against the terminal carrier for damage to the goods, it is not enough to show that they were delivered to the initial carrier in good condition, but the plaintiff must further prove that they remained in such condition when received by the defendant. There is no presumption that the damage was suffered on its road rather than on that of the initial carrier. (Mich.) *Rolfe v. Lake Shore etc. Ry. Co.*, 389.

Statutory Regulation of Sale of Passenger Tickets.

2. CONSTITUTIONAL LAW—Carriers, Statutes Relating to Non-transferable Tickets Only.—A statute prohibiting traffic on nontransferable signature tickets issued by common carriers and sold below the standard rates, and making such traffic a misdemeanor, is not unconstitutional on the ground that it delegates to carriers authority to create a penal offense or not, as they may choose to issue or not to issue tickets of that class. (Tenn.) *Samuelson v. State*, 805.

3. CONSTITUTIONAL LAW—Carriers, Restricting Sale of Tickets to Agents of.—A state, in the exercise of its police power, may, by regulations, require carriers to sell their own tickets, either directly or through their agents, and may prohibit all other persons from making such sales. (Tenn.) *Samuelson v. State*, 805.

4. CONSTITUTIONAL LAW—Carriers—Property Rights of Original Purchasers of Tickets.—A statute prohibiting traffic in nontransferable signature passenger tickets issued and sold below a standard schedule rate is not invalid for depriving persons of property rights without due process of law. (Tenn.) *Samuelson v. State*, 805.

5. CARRIERS, Regulation of, When not Invalid for Vagueness.—A statute prohibiting traffic in passenger tickets sold and issued for less than standard schedule rates is not void for vagueness. (Tenn.) *Samuelson v. State*, 805.

6. CARRIERS, Statutes Restricting Right to Sell Tickets of.—A statute making it unlawful for any person other than an authorized agent of a common carrier to sell or otherwise deal in nontransferable signature passenger tickets issued below the standard schedule rate is not invalid as prohibiting such sales by everyone except such agents, while permitting them to sell. The statute is not susceptible of a construction permitting sales by such agents other than the original sale by them in behalf of their employers. (Tenn.) *Samuelson v. State*, 805.

CERTIORARI.

CERTIORARI is not the Proper Remedy for Relief Against a Judgment on the Ground that Process was not Served on the defendant, if the return will not disclose the facts as to the want of such service. (Mich.) *Wilcke v. Duross*, 394.

COMITY.

COMITY—Its Definition and Principles.—Comity is defined as courtesy, a disposition to accommodate. By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

COMMERCE.

INTERSTATE COMMERCE—Statute Prohibiting Traffic in Passenger Tickets.—A statute prohibiting traffic in nontransferable passenger tickets issued for less than the standard price, though applicable to tickets for transfer from one state to another, is not invalid as interfering with interstate commerce. It does not regulate nor cast any burden on commerce, but is merely a police regulation. (Tenn.) *Samuelson v. State*, 805.

COMMISSIONS.

See Brokers.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—Statute Void in Part.—In case of a scheme of legislation for a particular purpose, created by the en-

actment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and is unconstitutional, the whole is inefficient. The matter is governed by the rule, that where a part of a law is unconstitutional and was the inducement to the rest, which by itself would not have been enacted, the whole is void. (Wis.) *Huber v. Martin*, 1023.

2. CONSTITUTIONAL LAW—Special Laws—Class Legislation.—A statute undertaking to cover a certain class of persons engaged in a particular profession, as attorneys at law, but which does not undertake to select any particular person in that class, and applies to all alike who fall within such class, is not unconstitutional as special or class legislation. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

3. CONSTITUTIONAL LAW—Police Power—Public Nuisances.—In the exercise of the police power, the legislature has authority to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize it to be abated summarily, but if property which is innocent in its ordinary and proper use has been used for an unlawful purpose, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such unlawful use without giving its owner an opportunity for a hearing, and a statute thus providing is unconstitutional as depriving such person of his property without due process of law. (Neb.) *McConnell v. McKillip*, 614.

4. CONSTITUTIONAL LAW—Impairment of Obligation of Contracts.—A statute which deprives a holder of state bonds of the right to use his bond in payment of the purchase price of a certain class of public lands is not unconstitutional as impairing the obligation of a contract, if such statute provides for the payment by the state of the bond in money upon due presentation. (Ark.) *Tipton v. Smythe*, 44.

5. CONSTITUTIONAL LAW—Due Process of Law.—A statute providing for the calling in and payment of state bonds, and authorizing the state treasurer to pay valid bonds only, and thereby imposing upon him the duty of ascertaining the validity of all bonds presented for payment, is not unconstitutional as depriving a bondholder of his property without due process of law, as an appeal to the courts is always open to him from the adverse decision of the state treasurer. (Ark.) *Tipton v. Smythe*, 44.

See Attorney and Client, 2; Carriers, 2-6; Game Laws; Elections; Limitation of Actions, 1-4; Officers; Statutes; Taxation; Weapons.

Note.

Constitutional Law, answers, striking out of, when not permissible, 950-954.

Contempt of Court does not warrant refusal of right to answer and defend, 953.

CONTRACTS.

Validity.

1. CONTRACT—Agreement to Pay for the Return of Stolen Property.—An agreement to pay for the return of stolen property, or a check given to procure such return, is neither illegal, immoral nor against public policy, and may be enforced where it does not interfere with the public interest and duty, respecting the apprehension and conviction of the criminal. (Md.) *Schirm v. Wieman*, 373.

2. **Contracts.—Want of Mutuality is No Defense**, even in an action for specific performance of a contract, when the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. (Neb.) *Dickson v. Stewart*, 596.

Building Contract.

3. **CONTRACTS, Construction of.—In Construing a Contract Courts Should Place Themselves in the Same Situation as the Parties** were who made the contract, so as thereby to judge of the meaning of the words and a correct application of the language to the things described. (Md.) *Milske v. Steiner Mantel Co.*, 354.

4. **CONTRACT for the Construction of a Building, When not to be Construed in Connection with a Bond Given by the Contractor.**—If a contract is entered into for the construction of a building within a time and on the conditions therein specified, and the contractor gives a bond with a surety for the performance of the contract, within such time and upon such conditions, the covenants and conditions of the bond are not to be read into the contract, and taken not only as narrowing and limiting the obligations of the person contracting for the erecting of the building, but also as imposing new and additional duties upon him. (Md.) *Milske v. Steiner Mantel Co.*, 354.

5. **CONTRACT for the Construction of a Building—Bond Declaring that Neither the Principal nor the Surety Therein Shall be Liable for Damages Resulting from the Act of God.**—If a building contract provides that the building shall be constructed within a time specified and according to certain plans and specifications, and that the builder will execute a bond for the faithful performance of his duties in erecting the building, and such bond, when executed and accepted, provides that neither the principal nor the surety shall be liable for damages resulting from the act of God, the bond does not vary or alter the meaning of the contract so as to make the owner answerable for the contract price, or for a portion thereof, when the building as partly constructed is destroyed as the result of a storm. (Md.) *Milske v. Steiner Mantel Co.*, 354.

6. **BUILDING CONTRACT—Right to Recover on Partial Performance.**—If a building contract is entered into, but provides for the payment of specified amounts as the work progresses, an action may be brought for the payment of any such installment when it becomes due by the terms of the contract. (Md.) *Milske v. Steiner Mantel Co.*, 354.

7. **BUILDING CONTRACT.—Notwithstanding the Destruction of a Partially Constructed Building by a Storm**, the owner is under obligation to permit the builder to perform his contract by rebuilding the structure. (Md.) *Milske v. Steiner Mantel Co.*, 354.

8. **BUILDING CONTRACT—Acceptance as Waiver.**—The owner of land on which he contracts to have a house erected may recover damages for defective construction, although he pays the contract price, takes possession, and does not discover the defect until eight months thereafter. (Ky.) *Ludlow Lumber Co. v. Kahling*, 254.

Breach of Contract—Evidence.

9. **EVIDENCE—Breach of Contract.**—In an action to recover for breach of contract, evidence that one of the parties borrowed money to enable him to fulfill his contract is admissible upon the issue as

to his ability and readiness to perform his part of the agreement. (N. C.) *Ives v. Atlantic etc. R. R. Co.*, 732.

10. **EVIDENCE—Breach of Contract—Act of Agent.**—In an action to recover for breach of contract, evidence of what defendant's agent especially deputed to make and execute such contract said and did in that particular transaction is admissible. (N. C.) *Ives v. Atlantic etc. R. R. Co.*, 732.

Repudiation of Settlement—Doctrine of Refund.

11. **REPUDIATION OF SETTLEMENT.**—The Whole Doctrine of Refund upon repudiation of a contract of settlement is not technical, but equitable, and requires merely that the practical rights of the other party shall not thereby be prejudiced; that he shall be no worse off than if he had never made the contract of settlement. Under this principle, application of money paid on a void settlement to an actual existing debt due from the payor entirely satisfies all requirements. (Wis.) *Bowe v. Gage*, 1010.

See Sunday Contracts.

CONVERSION.

See Trover.

CORPORATIONS.

Existence and Termination—De Facto Corporation.

1. **CORPORATIONS—Effect of Termination.**—The supposed common-law rule, that upon the termination of a corporation its debts become extinguished, its realty reverts to the grantors and its personal property goes to the sovereign, if it ever existed in fact, is wholly obsolete, except as to purely public corporations. (Wis.) *Huber v. Martin*, 1023.

2. **CORPORATION.**—The Law That Corporate Existence cannot be Inquired Into, except by judicial proceedings in the name of the state, does not apply to a pretended but not even a de facto corporation. (Wis.) *Huber v. Martin*, 1023.

3. **CORPORATION DE FACTO.**—An Unconstitutional Act of the Legislature is not a sufficient basis for a corporation de facto. That can exist only in case of a law under which it might have been created de jure. (Wis.) *Huber v. Martin*, 1023.

Expiration and Renewal of Charter.

4. **CORPORATIONS.**—After the Charter of a Corporation has Expired It is Without Authority to take any proceedings of a corporate nature for the purpose of expelling a member of the late corporation, and thus depriving him of property rights. (Ga.) *United Brothers v. Williams*, 64.

5. **CORPORATIONS.**—On the Expiration of the Charter of a Corporation Its Property is Held in Trust for its members. (Ga.) *United Brothers v. Williams*, 64.

6. **CORPORATIONS.**—On the Renewal of a Corporate Charter Which has Theretofore Expired, all the property of the old corporation then in the hands of its officers and members is carried into the new corporation as created by the renewal of the charter. (Ga.) *United Brothers v. Williams*, 64.

7. **CORPORATIONS—Rights of the Members of the Old Corporation on the Renewal of Its Charter.**—On the renewal of the charter

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of an expired corporation, each person interested in the assets of the corporation as a member at the date the old charter expired becomes a member of the corporation created by the renewal, and the corporation as renewed is bound to admit into membership every person interested in the property of the old corporation as it existed at the date of the expiration of the charter. (Ga.) *United Brothers v. Williams*, 64.

Expulsion of Members.

8. **CORPORATIONS.—Mandamus is a Proper Remedy for One Who has Been Unlawfully Deprived of His Privilege as a Member of the Corporation.** (Ga.) *United Brothers v. Williams*, 64.

9. **CORPORATIONS.—The Expulsion of a Member of a Corporation Because He has Testified Against It in an action to which it was a party is wholly unauthorized where there is no claim that he testified falsely, and if the corporate charter expires and a new one is obtained he cannot be denied membership on account of such testifying.** (Ga.) *United Brothers v. Williams*, 64.

Purchase of Stock in Rival Company.

10. **CORPORATION.—Purchase of Stock of a Rival to Prevent Competition.—If one corporation purchases a majority of the stock of another for the purpose of controlling the latter and preventing competition, the transaction is one which the courts will not uphold.** (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

11. **CORPORATIONS, Purchase of the Stock of Another but in the Name of a Natural Person.—If the stock of one corporation is purchased by another with a view to prevent competition, the transaction is not relieved of its unlawful character by the fact that the purchase is made by and in the name of a natural person. To hold otherwise would sustain a transaction illegal in its character accomplished by indirection when it could not be done if the method were direct.** (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

12. **ONE CORPORATION cannot Become a Stockholder in Another Unless such power is given to it by its charter or is necessarily implied thereunder, especially if the purpose of the purchase is to control the management of the other corporation.** (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

13. **CORPORATIONS.—Minority Stockholders, Right to Enjoin Scheme to Acquire Stock by Rival Corporation to Prevent Competition.** If a corporation, for the purpose of preventing competition between it and a rival corporation, causes a majority of the stock of the latter to be purchased for the benefit of the former, the minority shareholders are entitled to an injunction to prevent the voting of the stock so purchased. (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

Option for Sale of Stock.

14. **OPTIONS UNDER SEAL.—Consideration.—Presumption.—An option under seal for the sale of shares of stock in a corporation is in the nature of a continuing offer to sell, and is conclusively presumed to be made upon a sufficient consideration.** (Va.) *Watkins v. Robertson*, 880.

15. **OPTIONS UNDER SEAL.—Specific Performance.—Damages.—An option under seal for the sale of shares of stock in a corporation, after the agreement is delivered to the offeree, cannot be revoked during the time stipulated for, and if exercised by the acceptance**

of the offer, within the time limited, the agreement will be specifically enforced, or damages may be recovered for the breach, notwithstanding an attempted revocation. (Va.) *Watkins v. Robertson*, 880.

16. OPTIONS Under Seal—Consideration—Estoppel to Deny.—The recital of the payment of a consideration in an option under seal for the sale of shares of stock in a corporation cannot be contradicted, nor its sufficiency questioned so as to defeat the operation of the option according to the purpose designated in the contract creating it, in the absence of fraud, illegality or mistake. This rule applies with great force where the right of a third person to enforce the contract and option is involved. (Va.) *Watkins v. Robertson*, 880.

Liability for Torts.

17. CORPORATIONS—Liability for Torts.—Private corporations are liable for their torts committed under such circumstances as would attach liability to private persons. That the conduct complained of necessarily involved malice or was beyond the scope of corporate authority, constitutes no defense. (N. C.) *Sawyer v. Norfolk etc. R. R.*, 716.

Foreign Companies.

18. FOREIGN CORPORATIONS—Subjection of to the Policy of the State.—A corporation coming into the state is subject to all the rules and regulations provided by its laws, and therefore cannot have power to purchase the stock of a rival corporation for the purpose of reducing competition between them, if a domestic corporation has not such power. (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

See Libel and Slander.

Note.

Corporations, libel by agent of, when liable for and when not, 721, 723.

libel by, criminal liability for, 724.

libel by, damages exemplary, when should be exonerated from, 726.

libel by, damages for, measure of, 725, 726.

libel by, editors' or officers' liability for, 724.

libel by, exemplary damages for, 724, 725.

libel by, liability of in punitive damages for, 723.

libel by, officer of, when not personally liable for, 722.

libel, evidence necessary to support action for, 723.

libel, liability for, 721.

libel, malice necessary to support action against for, 723.

COTENANCY.

See Tenancy in Common.

COURTS.

Jurisdiction.

1. JURISDICTION.—In an Action Against a Nonresident, where there is only substituted service of process, the court acquires no jurisdiction for mere purposes of personal adjudication, but only to enter a judgment with reference to or to be enforced upon property within the state, or a judgment concerning the status of one of our own citizens. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

2. JUDGMENTS—Jurisdiction.—A petition or complaint must be filed in the court whose action is sought, or the subject matter must be otherwise presented for its consideration in some mode sanctioned by law, in order to confer jurisdiction upon the court to render judgment. (Ark.) *Swing v. St. Louis Refrigerator etc. Co.*, 38.

Probate Courts.

3. PROBATE COURTS have Jurisdiction to settle and sign bills of exceptions. (Kan.) *Humbarger v. Humbarger*, 204.

4. PROBATE COURTS—Summary Proceedings to Discover and Recover Property.—Summary proceedings in probate courts authorized by statute for the discovery and to compel the delivery of property of an estate suspected of having been concealed, embezzled or conveyed, cannot be employed to enforce the payment of a debt, or liability for the conversion of the property of the estate, or to try controverted questions of the right to property as between the representative of the estate and others. (Kan.) *Humbarger v. Humbarger*, 204.

COVENANTS.

COVENANTS—Breach—Right of Action.—If land subject to a mortgage is conveyed with warranty of title and against encumbrances, the covenantee's right of action for breach of the covenant accrues on his paying the judgment recovered by the mortgagee's receiver for the purpose of saving the land from sale. (Ark.) *Scoggin v. Hudgins*, 60.

DAMAGES.

1. DAMAGES for Wounded Feelings are not Punitive but Compensatory, and the estate of a decedent may be liable for such damages. (Ga.) *Morris v. Duncan*, 105.

2. PUNITIVE DAMAGES Against the Estate of a Decedent cannot be Awarded, because, on account of his death, the object in awarding such damages must fail. (Ga.) *Morris v. Duncan*, 105.

See Death.

DEATH.

1. NEGLIGENCE—Death of Minor Child—Emancipation.—The right of a parent to recover for the negligent killing of his minor son in no way depends upon the fact of the emancipation of the son prior to his entering into defendant's employment. The right to recover does not depend upon the services which the deceased could have rendered to his father. (Mo.) *Matlock v. Williamsville etc. Ry. Co.*, 481.

2. NEGLIGENCE—Death of Minor Child—Misrepresentation of Age—Right of Parent to Recover.—If a minor child is negligently killed by his employer, the fact that he misrepresented himself to be of age in order to obtain the employment, and that his employer accepted him, relying upon his representations, does not bar a suit by the minor's parent to recover the damages provided by statute for the negligent killing of a minor child. (Mo.) *Matlock v. Williamsville etc. Ry. Co.*, 481.

DEEDS.

1. DEEDS—Voidable in Part.—A contract of conveyance, if voidable in part, is voidable as to all, as there can be no apportionment thereof. (Ark.) *Reeder v. Meredith*, 22.

2. CONVEYANCE, Failure to Name a Grantee Therein.—The fact that the name of the grantor does not appear in a conveyance is not a fatal defect, if, from the whole instrument, it sufficiently appears to be his contract and deed and clearly expresses his intention to convey the property, and the omission of the pronoun "I" therefrom is evidently a clerical error which is supplied by the context and subsequent recitals of the deed. (Tenn.) Insurance Co. of Tennessee v. Waller, 763.

3. CONVEYANCE, Construction of.—A conveyance granting land to two parties and the survivor of them, and to their heirs and assigns, does not make the grantees joint tenants of the fee, but does make them joint tenants for life, with a remainder to the survivor in fee, and a conveyance by one of the grantees does not convert the estate into a tenancy in common, or have any effect against the other grantee after the death of the one executing the conveyance. (Mich.) Finch v. Haynes, 447.

4. DEEDS—Exceptions and Reservations.—An exception keeps a deed from passing the thing excepted; a reservation reserves something out of the thing granted. (W. Va.) Ammons v. Toothman, 908.

5. DEEDS—Exception of Oil-well—Deepening of Well.—If a deed conveys oil in land "except a well now producing oil," and that well, ceasing to be productive, is deepened by the lessee to a different sand rock, the oil produced from such rock is within the exception of the deed. (W. Va.) Ammons v. Toothman, 908.

6. DEEDS—Effect of Alteration.—If a deed conveying land to a certain person is properly acknowledged, and subsequently the name of the grantee is stricken out and that of his wife inserted, without the knowledge or consent of the grantor, and the deed is then recorded, it is not, in its altered form, binding on the grantor, and does not transfer any title to the original grantee's wife. (N. C.) Perry v. Hackney, 741.

See Husband and Wife, 1.

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DESCENT AND DISTRIBUTION.

1. DESCENT AND DISTRIBUTION—Inheritance by Murderer.—If the statute of descents provides in clear and unambiguous terms that a husband shall inherit from his wife dying intestate, and makes no exception on account of crime on his part, the courts cannot, upon considerations of public policy, so interpret the statute as to exclude from the inheritance one who murders his wife for the purpose of acquiring her property. (Kan.) McAllister v. Fair, 233.

2. DESCENT AND DISTRIBUTION—Right of Criminal to Inherit.—If the statute of descents contains no exception on account of crime by one entitled to inherit under its terms, the courts can add none. (Kan.) McAllister v. Fair, 233.

DIVORCE.

1. DIVORCE—Moral Turpitude—Voluntary Manslaughter.—Under a statute giving as a ground for divorce the conviction of either

party of an offense involving moral turpitude, and under which he or she is sentenced to the penitentiary for a term of two years or longer, a wife becomes entitled to a divorce on her husband being convicted of voluntary manslaughter and sentenced to the penitentiary for a term of more than two years. (Ga.) *Holloway v. Holloway*, 102.

2. **DIVORCE FOR CRIME—Pardon, Effect of.**—If a husband is convicted and sentenced for a crime entitling his wife to a divorce, his subsequent pardon by the governor does not destroy her right to such divorce. (Ga.) *Holloway v. Holloway*, 102.

3. **DIVORCE—General Demurrer, When Properly Overruled.**—Where a bill for divorce has two grounds or matters of relief in that it charges adultery calling for an absolute divorce, and desertion calling merely for a decree of separation, a general demurrer which does not separate these charges is properly overruled, although the bill may be bad because it does not name the particeps criminis in adultery, nor give time, place and circumstance. (W. Va.) *Trough v. Trough*, 940.

4. **DIVORCE—Denial of Right to Defend Suit.**—In an action for a divorce the court has no power, because the defendant has failed to pay suit money and temporary alimony required of him, to strike out and disregard depositions filed by him in defense of the suit, and grant a final decree of divorce against him. (W. Va.) *Trough v. Trough*, 940.

5. **DIVORCE—Confessions of Adultery made in the country are not admissible in evidence in a suit for a divorce for that offense.** (W. Va.) *Trough v. Trough*, 940.

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EJECTMENT.

1. **EJECTMENT—Title Acquired Pendente Lite.**—The recovery of the plaintiff in ejectment may be defeated by the defendant showing title in himself acquired after the commencement of the action. (Mont.) *McCauley v. Jones*, 538.

2. **EJECTMENT—Pro Forma Party—Recovery on Equitable Title.** In an action of ejectment by a wife to which her husband is made a party only pro forma, with no allegation of any title in him, he is not entitled to recover on proof that he holds the equitable title. (N. C.) *Perry v. Hackney*, 741.

3. **EJECTMENT—Transfers Pendente Lite.**—If, after the institution of an action in ejectment, the plaintiff conveys the land by deed in fee simple, and the grantee is not made a party, to the suit, the defendant is, upon his motion, entitled to a judgment of nonsuit. (N. C.) *Burnett v. Lyman*, 691.

4. **EJECTMENT—Real Parties in Interest.**—The rule that in an action of ejectment the plaintiff must have the right to the possession not only at the time of the institution of the suit, but at the time of trial also, is not altered by a statute providing that the

action shall not abate by death or transfer of interest, as this statute must be construed in connection with another statute providing that every action must be prosecuted in the name of the real party in interest, and that when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. (N. C.) *Burnett v. Lyman*, 691.

5. EJECTMENT—Transfers Pendente Lite.—In an action of ejectment the grantee of the land pendente lite may not only be substituted as party plaintiff, but if the original plaintiffs remain in the case, such grantee having become a party in interest, he is necessary to a complete determination of the action, and it is the duty of the court to have him brought in and made a party. (N. C.) *Burnett v. Lyman*, 691.

ELECTIONS.

1. CONSTITUTIONAL LAW—Elections—Property Qualifications of Officers.—A constitutional provision that no property qualification shall be required for any office of public trust, or for any vote at any election, applies only to elections and offices provided for in such constitution, and has no application to elections held in, or officers chosen for a public corporation created by statute, such as a drainage district, whose directors may be required to be freeholders elected by resident taxpayers. (Kan.) *State v. Monahan*, 224.

2. CONSTITUTIONAL LAW—Elections—Property Qualifications of Officers.—The elections held to choose officers of a drainage district or to pass upon the expediency of proposed improvements designed for protection against floods are not merely other elections than those provided for in the constitution; they are of a different character from any therein referred to, and so far dissimilar in their nature that it cannot be inferred that they were within the contemplation of the constitutional convention when the qualifications of electors were under consideration by that body. (Kan.) *State v. Monahan*, 224.

EMINENT DOMAIN.

Selection of Route Along River.

1. EMINENT DOMAIN—Selection of Route Along River.—In its exercise of the right of eminent domain, a railroad company has the right to select the particular route which it deems most advantageous; and, having selected a route with which a river interferes, it has the power to secure land necessary for its use in constructing and maintaining the road on that route in such a manner as to afford security for life and property. (Mont.) *State v. District Court*, 540.

2. EMINENT DOMAIN—Change of River Channel.—The changing of the channel of a river, which otherwise would have to be crossed by a railroad in order to follow the route selected, when necessary to make the road secure for life and property, is part of the "construction" of the road itself. Hence the land necessary to make such change may be condemned. (Mont.) *State v. District Court*, 540.

Defendant's Pleadings.

3. EMINENT DOMAIN—Necessity of Defendant Pleading.—In eminent domain proceedings the defendant should appear by demurrer or answer. If he fails to do so, he has no standing in court for any purpose nor right to be heard in the subsequent proceedings. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

4. **EMINENT DOMAIN—Effect of Defendant not Pleading.**—The only effect of a failure by the defendant to appear by demurrer or answer in eminent domain proceedings is to shut him out from participating in the proceedings. The court must, nevertheless, determine whether the use for which the property is sought to be appropriated is a public use, limit the amount taken to the necessities of the case, and ascertain the damages under the procedure and in accordance with the standard provided therefor in sections 2220, 2221, and 2224 of the Code of Civil Procedure. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

5. **EMINENT DOMAIN—Failure to Take Default.**—If the plaintiff in eminent domain proceedings does not default upon the failure of the defendant to plead, but permits the case to proceed to the making of the order of condemnation as if issues were properly made, and makes no objection until final hearing in the district court, it will be presumed that the issues were made and properly determined. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

6. **EMINENT DOMAIN—Pleading Damages.**—The defendant in eminent domain proceedings is not required to set up his claim for damages, whether general or special, in his pleadings in any form, in order to give the plaintiff notice of their character and amount so that he may be prepared to meet him. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

7. **EMINENT DOMAIN—Pleading Damages to Land not Taken.**—The defendant in eminent domain proceedings is not required specially to plead damages to portions of his land not actually traversed by the railroad of the plaintiff and not described in the petition. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

Damages.

8. **EMINENT DOMAIN—Measure of Damages.**—In determining the amount which the defendants are entitled to recover in eminent domain proceedings, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the plaintiff as a willing purchaser and the defendants were willing sellers. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

9. **EMINENT DOMAIN—Damages to Land not Taken.**—Where the land of the defendant in eminent domain proceedings is in a compact body, it is clearly within the purview of the court's duty to ascertain what damages have accrued, not only as to the part described in the complaint, but also as to the whole of the body, only a part of which is taken. Such damages are not special in the proper meaning of that term. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

10. **EMINENT DOMAIN—Measure of Damages—Evidence of Offers to Buy.**—Evidence in behalf of the plaintiff railroad company in eminent domain proceedings, of offers to purchase lands in the vicinity of the defendant's property indicating an enhancement in values from the building of the road, are inadmissible, when made by persons not parties to nor witnesses in the proceedings. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

11. **EMINENT DOMAIN—Disturbing Verdict on Appeal.**—The evidence in eminent domain proceedings may be sufficient to sustain the verdict, although the statements of witnesses are conflicting and unsatisfactory on material points. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

12. EMINENT DOMAIN—Appeal—Excessive Verdict.—The findings of the jury as to the amount of damages sustained by the defendant by the construction of a railroad through his land will not be disturbed on appeal because excessive, unless so obviously and palpably out of proportion to the injury as to be in excess of what is meant by the expression "just compensation" as used in the constitution. (Mont.) *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 546.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 2, 3.

EQUITY.

Practice in Equity.

1. EQUITY JURISDICTION—Effect of Prayer.—The statement of facts in a complaint in equity, and not the prayer for relief, constitutes the cause of action, which confers jurisdiction. (Ark.) *Rugg v. Lemley*, 17.

2. EQUITY PRACTICE—Cross-bill, When Should be Dismissed.—If the complainant in a cross-bill is merely a nominal party to the original bill against whom no relief is prayed, and he will obtain all the relief to which he is entitled if the prayer of the original bill is granted, it is proper to dismiss such cross-bill. (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

Relief Against Mistake.

3. EQUITY JURISDICTION—Unilateral Mistake—Cancellation of Contract.—While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a person whose conduct has in no way contributed to or induced the mistake, and who will gain no unconscionable advantage thereby. (Me.) *Bibber v. Carville*, 303.

4. EQUITY JURISDICTION—Relief Against Mistake.—Equity does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call a court of equity into activity. (Me.) *Bibber v. Carville*, 303.

5. EQUITY JURISDICTION—Relief Against Mistake.—If a person has acted in ignorance of facts merely, courts of equity will never afford relief against mistake when actual knowledge would have been obtained by the exercise of due diligence and inquiry. (Me.) *Bibber v. Carville*, 303.

See Cancellation of Instruments.

ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

Note.

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ESTOPPEL.

ESTOPPEL IN PAIS.—The General Doctrine is that he who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other. (Wis.) *Marling v. Nommensen*, 1017.

EVIDENCE.**In General.**

1. **EVIDENCE—Letters Written by Third Person.**—A letter in the handwriting of a third person which appears to be one of many written by him to the plaintiff in divorce, and found under a couch in her room, is admissible against her. (Me.) *Purinton v. Purinton*, 309.

2. **EVIDENCE—Letters Read to Witness.**—If one voluntarily and without solicitation reads the whole or a portion of a letter to another, and the person hearing does not undertake to repeat the contents of such letter, but only what the person purporting to read or state has said, such statements assume the form of an admission by the person holding the letter, and testimony of such evidence becomes primary evidence. This rule applies as against a plaintiff in divorce as to letters written by her after her marriage to the defendant to a third person and by him to her, the contents of which have been read to the witness. (Me.) *Purinton v. Purinton*, 309.

3. **EVIDENCE—Admissions—Best Evidence.**—If it is sought to use a written statement as an admission, the "best evidence" rule does not apply. (Me.) *Purinton v. Purinton*, 309.

4. **EVIDENCE.**—Admissions and Statements made by a person are in all cases admissible in evidence against him, though such state-

ments and admissions may involve what must necessarily be contained in some writing, deed or record. (Me.) *Purinton v. Purinton*, 309.

5. **EVIDENCE, Hearsay, When Inadmissible.**—In an action for seduction, the plaintiff should not be permitted to testify that she had been told that the defendant had stated in his store that she was a mother, that he could prove it, and that he was not the cause, such evidence is hearsay. (Mich.) *Greenman v. O'Riley*, 466.

Res Gestae.

6. **EVIDENCE—Res Gestae.**—If a railroad brakeman is mortally injured while in the discharge of his duty and lives only a short time thereafter, a statement by him as to how he received the injury is admissible in evidence as part of the *res gestae*. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

7. **EVIDENCE—Admissions—Res Gestae.**—It is not within the scope of the authority of manager of a hotel to bind his employer by admissions concerning a trespass committed by a servant of the hotel, when such admissions are made the day after the commission of the trespass. They are not admissible as part of the *res gestae*. (Neb.) *Clancy v. Barker*, 559.

See *Contracts*, 9, 10.

EXECUTIONS.

1. **EXECUTION, Interest of the Devisee, When Subject to.**—If a testator devises all his real estate occupied as a homestead to his wife for life, and within two years after her death to be sold, the proceeds to be equally divided among his six children, they take no vested interest in such property on the death of the testator, but only a right to money when the land shall be sold as directed, and the interest of one of them is not subject to levy and sale under execution, and such levy and sale are void. (Ill.) *Darst v. Swearingen*, 152.

2. **EXECUTION SALE of Property Conveyed to Secure Indebtedness.**—If one makes a promissory note and executes a conveyance to secure its payment, and an execution against his grantee is levied on the property, the grantor remaining in possession, the purchaser under such execution takes only the rights of such grantee. (Ga.) *Bridger v. Exchange Bank*, 118.

3. **EXECUTION, Burden of Proof in an Attack Upon.**—One who alleges that a levy is void for excessiveness carries the burden of sustaining his contention. (Ga.) *Bridger v. Exchange Bank*, 118.

4. **EXECUTION.—A Levy is not Necessarily Excessive** because the value of the land is considerably more than the amount of the execution. (Ga.) *Bridger v. Exchange Bank*, 118.

5. **EXECUTION—Excessiveness of Levy, When a Question for the Jury.**—If the property levied upon and sold under execution was worth considerably more than the amount due, and it was reasonably capable of subdivision, and fronted fifty-five feet on one street and ran back two hundred feet to an alley, giving an outlet to another street, and there were houses fronting on both the street and the alley, separately numbered and separately rented, it is a question for the jury whether the levy was excessive and whether the property should have been divided for the purpose of sale. (Ga.) *Bridger v. Exchange Bank*, 118.

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EXECUTORS AND ADMINISTRATORS.*Power and Duties.*

1. **EXECUTORS AND ADMINISTRATORS—Limitation of Power.** The power and authority of an administrator or executor over the estate of the deceased is confined to the sovereignty by virtue of whose laws he is appointed. (Me.) *Brown v. Smith*, 339.

2. **EXECUTORS AND ADMINISTRATORS.—An Administrator is a Trustee** for all who are interested in the estate which he has in charge. (Ark.) *Reeder v. Meredith*, 22.

3. **EXECUTORS AND ADMINISTRATORS—Stock in Foreign Corporation—Place of Ownership.**—If the owner of corporate stock dies in the state where the corporation is organized, leaving the certificates in another state, a public administrator taking charge of his estate situated in the latter state has no right to claim such certificates of stock which are only evidence of the ownership of the stock. (Mo.) *Richardson v. Busch*, 472.

4. **EXECUTORS AND ADMINISTRATORS—Stock in Foreign Corporation—Place of Ownership and Administration.**—If the owner of corporate stock dies in the state where the corporation is organized, leaving the certificates of such stock in another state, the stock itself belongs to the administrator appointed in the state where the owner thereof dies, and the courts of the state where the certificates of stock are situated have no power to seize the stock at the instance of an administrator appointed there, as the stock itself is beyond the process of such courts, which have no power to apply such certificates to the payment of the decedent's debts in that state nor to distribute them among the kin of such decedent. (Mo.) *Richardson v. Busch*, 472.

Purchase by Executor.

5. **EXECUTORS AND ADMINISTRATORS—Purchase by—Improvements.**—An administrator who purchases the lands of the estate in bad faith is not entitled to any compensation for improvements placed thereon. (Ark.) *Reeder v. Meredith*, 22.

6. **EXECUTORS AND ADMINISTRATORS—Purchase by—Return of Consideration Received.**—If an administrator purchases the interest of an heir in the estate in bad faith, and is sued by him to enforce a trust as to part of the property, the heir need not return the consideration received, if the administrator has realized from part of the property more than he paid for all of it. (Ark.) *Reeder v. Meredith*, 22.

7. **EXECUTORS AND ADMINISTRATORS—Purchase by—Accounting.**—If an administrator purchases the interest of an heir in the estate and is sued by him to enforce a trust as to part of the property purchased, he is not entitled, in such suit, to an accounting by the administrator of his profits on the part of the interest of such heir not involved in the suit. (Ark.) *Reeder v. Meredith*, 22.

Speculation with Funds of Estate.

8. **EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate.**—So great a breach of trust is it for the personal representative of a decedent to engage in business with the funds of the estate, that the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the representative

liable for the amount so used with interest, or, at their election, take all the profits which the representative has made. (Me.) *Hayes v. Rich*, 314.

9. EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate.—It is the duty of an executor or administrator to settle the estate, pay the debts, and distribute the surplus, and not to speculate in demands against creditors. If the latter transaction is indulged in, all loss must fall upon such personal representative. (Me.) *Hayes v. Rich*, 314.

10. EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate—Recovery in Representative Capacity.—It is the duty of an administrator to collect a good note in favor of the estate in cash, and not to invest it in a worthless judgment at twenty cents on the dollar, and if he assumes the responsibility of employing the funds of the estate for such purpose, he must be deemed to have done so in his individual capacity. If an administrator thus changes the nature of the debt originally due the intestate by contract made with himself, he must sue for the new debt in his own name, and not in his representative capacity. (Me.) *Hayes v. Rich*, 314.

11. EXECUTORS AND ADMINISTRATORS—Speculation with Funds of Estate—Right to Recover in Representative Capacity.—If an administrator speculates with the funds of the estate and changes the nature of the debt originally due the intestate by a contract made with himself, his assumption that he can maintain an action thereon and recover judgment in his representative capacity is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that happened before the death of the intestate. (Me.) *Hayes v. Rich*, 314.

Trover and Conversion.

12. CONVERSION—Title—Collateral Attack.—If an administrator sues for damages for the wrongful conversion of certificates of stock belonging to the deceased, the issue is the title of the certificates and not the authority of the administrator to take charge of the estate of the deceased who died in another state, and the question whether the administrator's authority can be attacked in a collateral proceeding is not in the case. (Mo.) *Richardson v. Busch*, 472.

13. CONVERSION—Pleadings—Admissions.—If an administrator's petition in general terms charges conversions, and, in addition charges specifically how such conversion was made, namely, that defendant had in his possession certificates of stock in a foreign corporation and delivered them to decedent's administrator in the state where the decedent died, there is nothing in the petition from which it can be inferred that the certificates were lost to the estate, and a demurrer to the petition does not admit a state of facts on which the defendant would be liable for a conversion. (Mo.) *Richardson v. Busch*, 472.

Debts of Decedent—Sale of Real Estate.

14. EXECUTORS AND ADMINISTRATORS—Order of Payment of Debts.—The different funds or subjects of property constituting the estate of a deceased testator must be applied to the payment of debts in the following order: 1. The personal estate at large, not exempted by the terms of the will or necessary implication; 2. Real estate or an interest therein expressly set apart by the will for the payment of debts; 3. Real estate descended to the heir; 4. Real or per-

sonal property expressly charged with the payment of debts, and subject to such charge, specifically devised or bequeathed; 5. General pecuniary legacies; 6. Specific legacies; 7. Real estate devised by the will. (Va.) *French v. Vradenburg*, 838.

15. **ESTATES OF DECEDENTS—Limitation of Time Within Which to Apply for an Order to Pay Debts.**—In the absence of a legislative rule upon the subject an application for an order to sell lands of a decedent to pay his debts must be made within seven years unless the delay is satisfactorily explained. If the circumstances show good reason for the delay, a very much longer time will not bar the proceedings. (Ill.) *White v. Horn*, 155.

16. **ESTATES OF DECEDENTS—Laches in Executing an Order to Sell Real Estate to Pay Debts.**—An order to sell land to pay debts amounts to no more than a lien which should be enforced within the time allowed for the enforcement of judgment liens. If the order is not enforced within seven years, the parties may be brought before the court at any time within twenty years, and, in a proper case, the order may be revived and enforced; but it should not be enforced after twenty years where the only excuse for delay is that the lands were of so little value during such twenty years that they were worth nothing in the market, but their value had recently been much enhanced. (Ill.) *White v. Horn*, 155.

17. **EXECUTORS AND ADMINISTRATORS—Liability of Decedent's Lands for Debt.**—Land of a decedent, while held by his heirs, may, in equity, be subjected to sale for the payment of his debts accruing after the time allowed for the probate of claims has expired. (Ark.) *Scoggin v. Hudgins*, 60.

18. **EXECUTORS AND ADMINISTRATORS—Liability of Decedent's Lands for Debts—Innocent Purchasers.**—Interests or estates in lands of a decedent in the hands of innocent purchasers for value, and acquired from the heirs before the commencement of a suit to charge them with the payment of the decedent's debts, cannot be subjected thereto either in law or equity. (Ark.) *Scoggin v. Hudgins*, 60.

Setoff in Favor of Executor.

19. **EXECUTORS AND ADMINISTRATORS—Setoff in Favor of.** An administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime, purchased by such administrator with the funds of the estate for that purpose, after the death of the intestate. (Me.) *Rich v. Hayes*, 321.

20. **EXECUTORS AND ADMINISTRATORS—Setoff in Favor of.** If an executor or administrator sues for a debt created to him since the death of the decedent, the defendant in such suit cannot set off a debt due to him from the decedent, and the same rule applies against the personal representative when he is the defendant. (Me.) *Rich v. Hayes*, 321.

Foreign and Ancillary Administration.

21. **EXECUTORS AND ADMINISTRATORS—Foreign Administrator De Bonis Non—Sale of Real Estate by—Validity.**—If a non-resident dies testate in one state owning property in another, and executors named in his will are appointed and qualify as such in the former state, and letters testamentary are issued afterward to the same persons in the other state, an administrator de bonis non, who is appointed in the former state on account of the death of one

executor and the removal of the other, is not thereby made the successor in trust of the executors under their appointment in the other state, so as to enable the courts of that state to permit him to sell lands of the estate to pay its debts under an order previously granted to the executors, without giving a new notice of his application for such authority. A sale by him without such notice is void, and a deed under such sale constitutes no defense to an action of ejectment by the devisees or their successors in interest. (Kan.) *Albright v. Bangs*, 219.

22. EXECUTORS AND ADMINISTRATORS—Foreign Decedents—Ancillary Administration.—If assets of a foreign decedent are found within the state, ancillary administration must be obtained therein for the protection of resident creditors, before the courts of such state will enforce the recovery of debts due the foreign decedent. (Me.) *Brown v. Smith*, 339.

23. ADMINISTRATORS—Foreign—Assignment of Mortgage.—An administrator in one state cannot, by virtue of letters granted in another state, assign a mortgage of land situated in the first-named state, so as to enable the assignee to enforce payment thereof. (Me.) *Brown v. Smith*, 339.

See *Homesteads*, 2; *Partition*, 10-13; *Setoff*, 5, 6.

FALSE PRETENSES.

1. FALSE PRETENSES—Use of Confederate Money.—Where one party to a horse trade agrees to pay the other seven and one-half dollars to boot, and accordingly, with intent to defraud, hands him a ten dollar Confederate bill, saying: "Give me two dollars and a half; here is a ten dollar bill," whereupon the other receives the bill, supposing it to be United States currency, and passes two dollars and a half back as change, the offense of obtaining money under false pretenses is committed, although the bill may not be calculated to deceive a person of ordinary prudence and discretion, for the law protects the unwary and even the "foolish." The bill must be calculated to deceive, according to the capacity of him to whom it is presented to detect its falsity under the circumstances; whether or not it is, is a question for the jury. (Ky.) *Commonwealth v. Beckett*, 285.

2. FALSE PRETENSES.—If the Facts Recited in an Indictment for obtaining money under false pretenses show upon their face that they are capable of defrauding, and it is charged that the defendant by them did intentionally and wickedly defraud the prosecuting witness, it is unnecessary specifically to charge that they were capable of defrauding. (Ky.) *Commonwealth v. Beckett*, 285.

FORGERY.

CRIMINAL LAW—Forgery by Typewriting.—Forgery may be committed by the use of a typewriting machine by which both the body of the instrument and the purported signature are written. (Tenn.) *State v. Bradley*, 836.

FRAUD.

1. FRAUD—Presumption—Proof.—While fraud is never presumed and must be proved, it is not necessary that it be proved by direct evidence, and it may be shown by sufficient facts and circumstances

connected with and surrounding the transaction. (Mo.) *Klauber v. Schloss*, 486.

2. FRAUD—Sufficiency of Evidence.—An instruction as to the quantum and character of evidence necessary to warrant a finding of fraud inducing a settlement, merely cautioning the jury that they are to find fraud only if they are "satisfied by a preponderance of the evidence" that it occurred, in the face of a request for a further instruction that, notwithstanding a mere preponderance of evidence, the finding of fraud is not to be made unless the jury are satisfied by evidence that is clear, satisfactory and convincing, is erroneous, for it is only upon evidence that is clear and satisfactory that an affirmative finding of fraud can properly be made. (Wis.) *Bowe v. Gage*, 1010.

3. DECEIT.—In an Action for Deceit the Sole Question is whether the misrepresentations in fact deceived the party involved and materially affected his conduct. There is no issue whether or not the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence. The effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another. (Wis.) *Bowe v. Gage*, 1010.

FRAUDS, STATUTE OF.

1. FRAUD—Statute of Frauds.—A court of equity will never permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud. (Neb.) *Dickson v. Stewart*, 596.

2. STATUTE OF FRAUDS—Pleading.—One who has filed a general issue plea and thus denied the existence of a contract sued upon is entitled to rely on the statute of frauds. (Md.) *Mogart v. Smouse*, 367.

3. STATUTE OF FRAUDS—Trusts.—One who, under an agreement, purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption and at an inadequate price, cannot set up the statute of frauds against the person for whom he purchased, as the law will hold him to be a trustee *ex maleficio*. (Neb.) *Dickson v. Stewart*, 596.

4. STATUTE OF FRAUDS, Parol Agreement When not Within.—A preliminary parol agreement made at the execution and delivery of a conveyance of real property that the vendee will hold it in trust for a certain person is not within the statute of frauds. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

5. STATUTE OF FRAUDS—Growing Trees are a part of the realty, and a contract to sell or convey them, or any interest in or concerning them, must be reduced to writing. (N. C.) *Ives v. Atlantic etc. R. R. Co.*, 732.

6. STATUTE OF FRAUDS—Contract for Cordwood.—A contract to cut and convert trees growing on land belonging to a railroad company into cordwood, and for the delivery thereof on the railroad right of way, does not contemplate the transfer of any title to or interest in growing trees as they stand upon the land, and is therefore not within the statute of frauds. (N. C.) *Ives v. Atlantic etc. R. R. Co.*, 732.

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10. STATUTE OF FRAUDS—Agreement to Purchase Lands as Partners or on Joint Account.—An agreement between two persons that they will purchase lands and develop and sell them on joint account, and share equally in the profits and losses of the venture, is not within the statute of frauds, but constitutes them partners to the extent of the undertaking governed by it. (Md.) *Mogart v. Smouse*, 367.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—Solvency of Vendor.—If a transfer of property is made with intent to hinder or delay creditors, it is fraudulent as to them, whether or not the vendor is insolvent at the time of the transfer. (Mo.) *Klauber v. Schloss*, 486.

2. FRAUDULENT CONVEYANCES—Fraudulent Vendee.—If a deed of trust is given to secure a pretended debt, to the knowledge of the vendee, he, by accepting the provisions of the deed, becomes a party to the fraud. (Mo.) *Klauber v. Schloss*, 486.

3. FRAUDULENT CONVEYANCES—Consideration.—If a deed of trust is made with actual intent to hinder, delay or defraud creditors, and the cestui que trust knows of the purpose for which the transfer is made and is a party thereto, the deed is void as to such creditors of the vendor, regardless of the consideration for such deed, whether adequate or inadequate. (Mo.) *Klauber v. Schloss*, 486.

4. FRAUDULENT CONVEYANCES—Fictitious Consideration.—If part of the consideration for a conveyance of property is fraudulent or fictitious, the entire transaction is fraudulent as against creditors, and will be set aside. (Mo.) *Klauber v. Schloss*, 486.

5. CONVEYANCE in Fraud of Creditors, Effect of Reconveyance to the Grantor.—If property is conveyed for the purpose of defrauding creditors, and the grantee agrees by parol to hold it for the use of the grantor and to convey it as he may direct, though the trust may not be enforced, yet if the grantee respects it and makes a reconveyance as agreed upon, the legal and equitable titles become reunited, and the previous fraud will not bar the grantor from recovering upon any contract relating to such property for trespass upon it or upon a contract of insurance effected thereon by him. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

6. CONVEYANCES—Withholding from Record—Fraud.—The retention of personal property and the withholding of conveyances from record do not make the transfer void as to general creditors in the absence of fraud. (N. J. Eq.) *Cogan v. Conover Mfg. Co.*, 629.

GAME LAWS.

CONSTITUTIONAL LAW—Game Laws.—A statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law, without giving them a hearing, is unconstitutional as depriving such persons of their property without due process of law. (Neb.) *McConnell v. McKillip*, 614.

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GARNISHMENT.

1. **GARNISHMENT.**—No Lien on a Fund represented only by a negotiable instrument is obtained by an attempted garnishment. (Wis.) *Disconto Gesellschaft v. Umbreit*, 1063.

2. **A JUDGMENT or a Garnishment Against a Nonresident is Unauthorized and Void** if, at the time it was rendered, the garnishee had not answered, and there was nothing before the court from which it could be determined whether any property of either of the defendants had been seized. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

GUARANTY.

GUARANTY OF PAYMENT of Promissory Note, Effect of.—The guaranty of the payment of a promissory note is absolute, and it is not necessary, if the note is not paid at maturity, for the payee to show that he has exhausted his remedies against the maker or that the latter is insolvent. (Md.) *Wood Reaping etc. Co. v. Ascher*, 343.

GUARDIAN AND WARD.

1. **GUARDIAN—Duty to Invest Ward's Funds.**—It is the duty of a guardian, on receiving the funds of his ward, to invest so much of them as is not required for immediate and necessary use, as soon as he can do so with reasonable diligence. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

2. **GUARDIAN—Employment of Attorney to Collect and Invest Funds.**—A guardian may employ attorneys or agents to reduce the estate of his ward to possession and to protect it, but when once in his hands his personal duty to dispose of and manage it begins, which cannot be delegated. Therefore, if a guardian employs an attorney to collect the estate, and the funds collected are represented by checks or drafts payable to the guardian, he is accountable therefor where he indorses and hands them back to the attorney for investment, and the latter defaults. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

3. **GUARDIAN—Interest of Ward's Funds.**—The time from which a guardian should be charged with interest on the funds of his ward, lost through his negligence in investing them, is a matter resting in the sound discretion of the trial court in view of all the facts. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

4. **GUARDIAN—Allowance for Support of Ward.**—Where a guardian has voluntarily stood in loco parentis to his wards, and has never intended to charge them for lodging or services, neither the guardian nor his surety is entitled to any credit therefor. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

5. **GUARDIAN.—In an Accounting by a Guardian** annual rests should be made, the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

6. **GUARDIAN—Costs.**—In an Action by a guardian to compel his predecessor to account, it is proper to allow costs against a surety who appears in and defends the action. (Wis.) *Abrams v. United States Fidelity etc. Co.*, 1055.

Note.

Guardian and Ward, constructive trust against the one in favor of the other, 794.

HIGHWAYS.

1. **HIGHWAYS, Work on—Poll Tax.**—A statutory requirement that male citizens shall work on the public roads is not a poll or capitation tax. (N. C.) *State v. Wheeler*, 700.

2. **HIGHWAYS, Work on—Taxation.**—Conscription of labor to work the public roads is not a tax, but the exaction of a public duty. (N. C.) *State v. Wheeler*, 700.

HOMESTEADS.

1. **HOMESTEAD—Loss by Marriage of Infant.**—Under a statute providing that the unmarried infant children of a deceased homesteader shall be entitled to a joint occupancy of the homestead with his widow until the youngest arrives at full age, a daughter who marries during minority loses her homestead rights. (Ky.) *Jones v. Crawford*, 273.

2. **HOMESTEADS OF DECEDENTS—Claims of Creditors—Lien.** If a claim for a breach of covenant of warranty in a deed against a decedent does not accrue until after the close of the administration of his estate, the covenantee is entitled, on recovering judgment, to have it declared a lien on the decedent's homestead, to be sold only after the homestead has expired, although a constitutional provision declares that a homestead shall not be subject to the lien of any judgment or decree, or to sale under execution or other process thereon. (Ark.) *Scoggin v. Hudgins*, 60.

HOMICIDE.*Beckless or Accidental Killing.*

1. **HOMICIDE—Reckless Shooting.**—If two men engage in shooting at each other in a crowded waiting-room, and a bystander is killed, both are guilty of murder, one as principal and the other as aiding and abetting. (N. C.) *State v. Lilliston*, 705.

2. **HOMICIDE—Reckless Act.**—Malice is implied when an act, dangerous to others, is done so recklessly and wantonly as to evince depravity of mind and disregard for human life, and if the death of any person is caused by such an act, it is murder. (N. C.) *State v. Lilliston*, 705.

3. **MANSLAUGHTER—Accidental Killing.—Pointing a Loaded Revolver** at a person who does not know whether it is loaded or not is an assault, and if the person pointing the weapon pulls the trigger and discharges it, thus killing the person assaulted, the former is guilty of manslaughter, although he had no desire or intent to injure the person killed, and the shot was accidental. (Neb.) *Ford v. State*, 591.

4. **MANSLAUGHTER—Accidental Killing—Excessive Sentence.** If a person points a pistol at another in sport, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, the person holding the pistol is guilty of manslaughter, although the killing is purely accidental, but under such circumstances a sentence of seven years in state's prison is excessive and should be reduced to four years. (Neb.) *Ford v. State*, 591.

5. **MANSLAUGHTER—Request for Instructions.**—An accused on trial for murder is entitled to have his theory of the defense sub-

mitted to the jury, but if under his own theory he is guilty of manslaughter, and is convicted of that crime only, his rights are not prejudiced by a failure to present his theory of the defense by specific instructions. (Neb.) *Ford v. State*, 591.

Self-defense.

6. **HOMICIDE—Sudden Assault—Self-defense.**—If a person on trial for murder sets up the defense that he was suddenly assaulted it is not error to charge the jury that "self-defense exists where one is suddenly assaulted, and in defense of his person, where an immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills his assailant." (N. C.) *State v. Lilliston*, 705.

HUSBAND AND WIFE.

Conveyance by Wife.

1. **A CONVEYANCE by a Married Woman Without the Signature of Her Husband** is valid if she holds the property as a trustee and the conveyance is to carry out the trust. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

Tenancy by Entireties.

2. **TENANCY BY ENTIRETIES—Conveyance by Husband Alone.** Although a husband may, by deed in which his wife does not join, convey an estate by entireties, and thus entitle the grantee to hold during the grantor's life, such deed does not give the grantee a right to cut timber on the land conveyed. (N. C.) *Bynum v. Wicker*, 675.

3. **TENANCY BY ENTIRETIES—Conveyance by Husband Alone—Estoppel.**—If a husband, by deed in which his wife does not join, conveys an estate held by them by entireties, both he and she are estopped during their joint lives from interfering with the possession of the land thus granted and conveyed. (N. C.) *Bynum v. Wicker*, 675.

Note.

Husband and Wife, constructive trust against the one in favor of the other, 792.

INJUNCTIONS.

1. **INJUNCTION.—The Collection of Purchase Money on land** may be enjoined when the vendee is in possession under a deed with covenants of general warranty, and the title is questioned by suit prosecuted or threatened, or is clearly shown to be defective. (W. Va.) *Harvey v. Ryan*, 897.

2. **INJUNCTION.—The Collection of Purchase Money due the vendor of land** may be enjoined, when the vendee has entered into possession under a deed with covenants of general warranty, and a stranger has asserted title to and recovered the property in an action of ejectment which was pending at the time of the purchase. (W. Va.) *Harvey v. Ryan*, 897.

See Telephones.

INNKEEPERS.

1. **INNKEEPER, Liability of When He Also Maintains a Bathhouse.**—If one keeps an inn, and, separately therefrom, a bathhouse,

where persons bathing in the sea change their garments and leave their clothes, he is not liable as an innkeeper for property stolen from the bathhouse. (Ga.) Walpert v. Bohan, 114.

2. INNKEEPERS—Duties.—By the implied contract between a hotel-keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is a further implied undertaking on his part that the guest shall be treated with due consideration for his safety and comfort. (Neb.) Clancy v. Barker, 559.

3. INNKEEPERS—Duties.—The Duties of a hotel-keeper to his guests are similar to the common-law obligation of a common carrier to his passengers. (Neb.) Clancy v. Barker, 559.

4. INNKEEPERS—Trespass by Servant.—A trespass committed upon a guest in a hotel by a servant of the proprietor is a breach of the implied undertaking of the latter to care for the comfort and safety of the guest, rendering such proprietor or manager liable in damages, whether such servant was at the time of the trespass actively engaged in the discharge of his duties or not. (Neb.) Clancy v. Barker, 559.

5. INNKEEPERS—Assault by Servant.—An innkeeper must protect his guests while in the hotel from the assaults of a servant employed therein, whether actually engaged in his duties at the time or not, and in case of injury from such assault, the hotel-keeper must respond in damages. (Neb.) Clancy v. Barker, 559.

INSTRUCTIONS.

See Trial.

INSURANCE.

Premiums.

1. INSURANCE, LIFE—Course of Dealing Justifying Belief that the Insurer will not Insist upon a Forfeiture for Nonpayment of Premium.—The fact that out of thirty-six premiums paid seven were accepted after due, two of which were accepted after the assured presented a certificate of continued good health, two were forwarded by mail on the day they were due, and of the other three, one being paid one day overdue, another two days overdue, and the remaining one being mailed one day overdue, but not received until four days later, does not justify the insured in believing that the insurer will not insist on a forfeiture of the policy if subsequent premiums are not paid as they fall due. (Tenn.) Thompson v. Fidelity Mutual Life Ins. Co., 823.

2. INSURANCE, LIFE—Mere Indulgence in the Payment of Premiums does not constitute a waiver of a condition of forfeiture for the failure to pay premiums when due. (Tenn.) Thompson v. Fidelity Mutual Life Ins. Co., 823.

3. INSURANCE, LIFE—To Warrant a Recovery Where a Premium is not Paid When Due, it is necessary to prove (1) the course of dealing between the insured and the insurer in reference to the acceptance of overdue payments amounting to a custom or habit; (2) that by reason of this course of dealing, the insured was justified in believing that the insurer would not insist on a forfeiture for failing to pay subsequent premiums; (3) that the assured believed he could postpone the payment of premiums without risking a forfeiture; and (4) that he acted on this belief, and therefore, did not pay

the premium at its maturity. (Tenn.) *Thompson v. Fidelity Mutual Life Ins. Co.*, 823.

4. **INSURANCE, LIFE**—Tender of Premiums After Death of the Assured.—The permission to pay a premium after due during the life and good health of the assured is not equivalent to paying a premium after his death or loss of health. (Tenn.) *Thompson v. Fidelity Mutual Life Ins. Co.*, 823.

5. **INSURANCE, LIFE**—The Illness of the Assured is No Excuse for not Paying His Premium when it falls due. (Tenn.) *Thompson v. Fidelity Mutual Life Ins. Co.*, 823.

6. **INSURANCE, LIFE**—The Failure to Pay a Premium when due works a forfeiture, whether the condition requiring such a payment be regarded as precedent or subsequent. (Tenn.) *Thompson v. Fidelity Mutual Life Ins. Co.*, 823.

7. **INSURANCE, LIFE**—Incontestable Clause Does not Apply to Nonpayment of Premiums.—A policy providing that after three years, if the payments required shall have been made when due, it shall be incontestable, means incontestable for causes other than nonpayment of premiums, and an insured failing to pay a quarterly premium after such three years is not entitled to recover. (Tenn.) *Thompson v. Fidelity Mutual Life Ins. Co.*, 823.

Forfeiture and Reinstatement.

8. **INSURANCE, LIFE**—Forfeiture of Policy—Reinstatement.—If an insured person has forfeited his policy of life insurance by the nonpayment of dues, and has then complied with a provision in the policy that "delinquent members may be reinstated if approved by the medical director and president by giving reasonable assurance that they are in good health," but the officers of the insurance company decline to approve his application, he is not entitled to recover damages for the cancellation of his policy and refusal to reinstate him, in the absence of any showing that the action of such officers was fraudulent or arbitrary. (N. C.) *Lane v. Fidelity Mutual Life Ins. Co.*, 729.

9. **INSURANCE, LIFE**—Forfeiture of Policy—Reinstatement.—A provision in a policy of life insurance that delinquent members may be reinstated if approved by the medical director and president, by giving reasonable assurance that they are in continued good health, is valid and reasonable, and the required approval is not merely a ministerial act, but involves the exercise of judgment and discretion. (N. C.) *Lane v. Fidelity Mutual Life Ins. Co.*, 729.

10. **FIRE INSURANCE**—Cancellation of a Policy as a Waiver of Forfeiture.—A violation of a clause in a fire insurance policy against increase of hazard is not waived by the insurer canceling the policy by letter at about the date of a fire, on the ground of such violation. (W. Va.) *Ruffner Brothers v. Dutchess Ins. Co.*, 924.

Fire Insurance.

11. **INSURANCE** Against Fire, When Void Because the Insured Property is upon Leased Ground.—If a policy contains a condition stating that it is void if the subject of insurance is a building on ground not owned by the assured in fee simple, no recovery can be had thereon for the loss of a building on leased premises, where the application for insurance was oral, and no representation was made and no question asked respecting the title, and the insurer had no notice thereof, though the policy issued was not read by the assured prior to the fire, and he had no knowledge of the condition. (Mich.) *Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 458.

12. INSURANCE Against Fire—Evidence.—The burden of proving that the insurer had knowledge that the building insured was upon leased premises must be assumed by the assured where the policy's conditions make it void if the subject insured is upon premises on which the assured has not title in fee simple. (Mich.) Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 458.

13. FIRE INSURANCE—Construction of Iron-safe Clause.—In determining what constitutes such an inventory as is contemplated by an iron-safe clause in a policy of insurance, all parts of such clause should be construed together. (W. Va.) Ruffner Brothers v. Dutchess Ins. Co., 924.

14. FIRE INSURANCE—Iron-safe Clause.—The Inventory of a stock of merchandise, required by an iron-safe clause in a policy of insurance, is a list of all the articles in the stock, so itemized as to show the kinds and numbers or quantity thereof, with their values. (W. Va.) Ruffner v. Dutchess Ins. Co., 924.

15. FIRE INSURANCE—Iron-safe Clause.—What is an Inventory of a stock of merchandise, within the meaning of that term as used in the iron-safe clause of a policy of insurance, is to be determined in view of the peculiar circumstances of each case. Where a store is opened with an entirely new stock of goods at or about the date of the issuance of the policy, the invoices, giving the quantities of the goods, with their cost prices, may, if preserved for that purpose, constitute an inventory. (W. Va.) Ruffner v. Dutchess Ins. Co., 924.

Life Insurance.

16. INSURANCE, LIFE—Insurable Interest.—An uncle of an insured has no insurable interest in his life by reason of kinship. (Kan.) Metropolitan Life Ins. Co. v. Elison, 189.

17. INSURANCE, LIFE—Insurable Interest—Assignment.—A person cannot take directly, or by assignment, a policy of insurance on the life of one in whose life he has no insurable interest. (Kan.) Metropolitan Life Ins. Co. v. Elison, 189.

18. INSURANCE, LIFE—Insurable Interest—Assignment of Policy.—An agreement by which part of the insurance provided for in a life insurance policy is assigned by the insured and the beneficiary to one having no insurable interest in the life of the insured, upon consideration that the assignee is to pay all accruing premiums, is opposed to public policy, and neither such assignee nor beneficiary can recover on the insurance policy. (Kan.) Metropolitan Life Ins. Co. v. Elison, 189.

19. INSURANCE, LIFE—Insurable Interest—Assignment of Policy.—A beneficiary of an insured who knowingly and purposely sells and assigns to another, who has no insurable interest in the life of the insured, the policy of insurance on the life of the latter, cannot enforce the policy for his own benefit. (Kan.) Metropolitan Life Ins. Co. v. Elison, 189.

Accident Insurance.

20. ACCIDENT INSURANCE—Proximate Cause of Death.—A death results "proximately and solely from accidental cause," within the meaning of these words as used in an accident insurance policy, where the assured accidentally fell, sustained an abrasion of the skin through which bacteria entered, causing blood poisoning, from which he died. (Wis.) Cary v. Preferred Accident Ins. Co., 997.

21. ACCIDENT INSURANCE—Blood Poisoning.—An accident policy exempting from liability and injury "resulting from any poison or

infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not exempt the insurer from liability where the assured accidentally falls, sustaining an abrasion of the skin, through which bacteria enter, causing blood poisoning, from which he dies. (Wis.) *Cary v. Preferred Accident Ins. Co.*, 997.

22. ACCIDENT INSURANCE—Bodily Infirmary.—An exemption in an accident policy from liability for death "resulting either directly or indirectly, wholly or in part, from bodily infirmity or disease of any kind," does not exempt the insurer where the infirmity or disease results from an accident, as when the insured accidentally falls, sustains an abrasion of the skin, and blood poisoning follows, which results in death. (Wis.) *Cary v. Preferred Accident Ins. Co.*, 997.

Mutual Insurance Companies.

See Benefit Associations.

23. MUTUAL INSURANCE—Termination of Membership.—Under the Charter of a Mutual Insurance company providing, in effect, that one can become a member only by taking out a policy of insurance and that the membership can survive only to the end of the policy period upon which it is based, no one can rightly be treated as a member for any purpose at any time unless he then holds an unexpired policy of insurance. (Wis.) *Huber v. Martin*, 1023.

24. MUTUAL INSURANCE—Commencement of Membership.—If the charter of a mutual insurance company contains no provision on the subject, membership commences only with the taking out of a policy, and lasts only for the policy period. (Wis.) *Huber v. Martin*, 1023.

25. MUTUAL INSURANCE—Status of Members.—As regards rights and remedies, the policy-holders in a mutual insurance company are stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary. (Wis.) *Huber v. Martin*, 1023.

26. MUTUAL INSURANCE—Interests of Members.—The interests of policy holders in a mutual insurance company are twofold: they are both insurers and insured. In respect to the former, they are bound to share in the losses and entitled to share in the profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise. (Wis.) *Huber v. Martin*, 1023.

27. MUTUAL INSURANCE—Title to Property.—The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members the same as in case of a stock corporation. While the corporation owns the property, the members own the corporation. (Wis.) *Huber v. Martin*, 1023.

28. MUTUAL INSURANCE—Creation and Distribution of Surplus.—It is competent for a mutual insurance corporation, there being no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business. (Wis.) *Huber v. Martin*, 1023.

29. MUTUAL INSURANCE—Distribution of Surplus.—In case of a distribution of the surplus of a mutual insurance company or of its other assets, there being no charter provision to the contrary, ex-

isting policy-holders and such only are the legitimate distributees. In the aggregate, they are entitled to the whole. (Wis.) Huber v. Martin, 1023.

30. MUTUAL INSURANCE—Property Rights of Members.—The Legislature may Alter or amend the charter of a corporation, but cannot legitimately appropriate its property without the consent of all its members, either to its own use or that of a private party, though such party be a successor corporation, in the absence of some authorization to the contrary in the charter originally. (Wis.) Huber v. Martin, 1023.

31. MUTUAL INSURANCE—Property Rights of Members.—For all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members, whether they are stockholders in the technical sense or in the broader one which includes policy-holders in such company. (Wis.) Huber v. Martin, 1023.

32. MUTUAL INSURANCE—Constitutional Rights of Members.—The property of a mutual insurance company and the equitable property rights of its members are within the guaranties of the state constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the national constitution as regards the equal protection of the laws and deprivation of property without due process of law. (Wis.) Huber v. Martin, 1023.

33. MUTUAL INSURANCE—Distribution of Assets.—A law enacted during the life of a mutual insurance company providing for the distribution of its assets or a bestowal thereof upon another without consent of all of its members, no authority in that regard being contained in the charter of such company, offends against the constitutional limitations referred to. (Wis.) Huber v. Martin, 1023.

34. MUTUAL INSURANCE—Suits by Members.—Any member of a mutual insurance company, suing for himself and others similarly interested, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, when its officers will not move appropriately to that end. (Wis.) Huber v. Martin, 1023.

35. MUTUAL INSURANCE—Reorganization on Stock Plan.—In case of success, in form, of an attempt to reorganize a mutual insurance company on the stock plan under a law, in terms, authorizing it, and the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and goodwill, if the attempt is fruitless because of the enabling act being void such continued business is to be regarded as really that of the old corporations; as belonging to it. (Wis.) Huber v. Martin, 1023.

Foreign Insurance Companies.

See Receivers, 1, 2.

36.—FOREIGN INSURANCE COMPANY—Revocation of License. A Statute providing that if a foreign insurance company, without the consent of the other party to any suit brought by or against it in a state court, removes the suit to a federal court, the insurance commissioner shall forthwith revoke its authority to do business in the state, does not offend the United States constitution. (Ky.) Prewitt v. Security Mutual Life Ins. Co., 264.

37. INSURANCE—Foreign Insurance Companies—Assets.—Assessments to become due a foreign life insurance company from policyholders residing within the state are not, when due, debts or choses in action which such company can enforce therein. (N. C.) *Blackwell v. Mutual Reserve etc. Assn.*, 677.

38. INSURANCE—Foreign Companies—Void Contracts of Insurance.—A provision in an insurance policy that "this contract shall be governed by, subject to, and construed only according to the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York," is void so far as its enforcement in the courts of another is concerned. (N. C.) *Blackwell v. Mutual Reserve etc. Assn.*, 677.

INTEREST.

INTEREST—Application of.—Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterward, if there be a surplus, it is applied to sink the principal, and so toties quoties, taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. (Neb.) *Dickson v. Stewart*, 596.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—Construction of Statute.—A statute enumerating certain liquors, including "cider," when kept and deposited with intent to sell them for tippling purposes, or as a beverage, and declaring them to be intoxicating, was intended to include and does include "cider," when kept and sold for tippling purposes or as a beverage, even though such cider may be unfermented and non-intoxicating in fact. (Me.) *State v. Frederickson*, 295.

2. INTOXICATING LIQUOR—Statutory Construction.—When it appears that a certain liquor comes within the scope of a forbidden statutory enumeration as intoxicating, that moment its character becomes fixed by law, and its nonintoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute. (Me.) *State v. Frederickson*, 295.

3. INTOXICATING LIQUORS—Constitutional Law.—The constitutional right of the state legislature to regulate or prohibit the sale and keeping of intoxicating liquors, and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact is a legal exercise of the police power of the state and not in contravention of either the state or United States constitutions. (Me.) *State v. Frederickson*, 295.

JUDGMENTS.

Reversal or Entry on Appeal.

1. JUDGMENTS—Power of Supreme Court to Enter.—When the supreme court reverses or affirms the judgment of the court below, it may, in its discretion, enter final judgment therein or direct it to

be so entered in the court below. (N. C.) North Carolina Corp. Com. v. Atlantic Coast Line R. R. Co., 636.

2. JUDGMENT—Effect of Reversal.—Where the claim of a mortgage creditor was adjudged a lien superior to that of attaching creditors upon property assigned for the benefit of creditors, and he, under order of court, withdrew the funds which the assignees had paid into court, and distributed them among his creditors, the creditors of the assigned estate, upon the reversal of the judgment which has been appealed from but not superseded, cannot compel his creditors to refund the money, but must look to him alone. (Ky.) Fidelity Trust etc. Co. v. Louisville Banking Co., 279.

Entry Nunc Pro Tunc.

3. JUDGMENTS—Entry Nunc Pro Tunc.—Parol evidence of an order omitted from the record, if satisfactory, is sufficient to authorize a nunc pro tunc order or judgment. (Ark.) Liddell v. Bodenheimer, 42.

4. JUDGMENTS—Entry Nunc Pro Tunc.—A court has no authority to set aside or modify its judgment after the expiration of the term at which it was rendered, on application for a nunc pro tunc order. (Ark.) Liddell v. Bodenheimer, 42.

Default Judgment.

5. JUDGMENT BY DEFAULT, What is not.—A judgment entered after the defendant has answered, upon an issue of fact, though there is no appearance by him at the trial and no evidence offered on his part, is not a judgment by default. A judgment by default is one where the previous default of the defendant renders unnecessary any evidence on the part of the plaintiff. (Mich.) Leahy v. Wayne Circuit Judge, 443.

6. STATUTES, Construction of Must be Prospective.—A statute authorizing a court to open defaults does not apply to judgments by default already existing. (Ga.) Morris v. Duncan, 105.

7. JUDGMENTS—Entry Nunc Pro Tunc—Limitations.—An application for a nunc pro tunc order cannot be barred by limitation. (Ark.) Liddell v. Bodenheimer, 42.

Relief from Judgment.

8. JUDGMENT, Relief in Equity Against.—If the process is not served on the defendant, equity has jurisdiction to relieve from the judgment entered against him. (Mich.) Wilcke v. Duross, 394.

9. JUDGMENT, Relief Against in Equity—Amount Involved.—Though a judgment against the defendant is for less than one hundred dollars, yet if under it property is levied upon of much greater value than that sum, equity is not prevented from granting relief on the ground that one hundred dollars is not involved. (Mich.) Wilcke v. Duross, 394.

10. RELIEF Against a Judgment for Want of Service of Process, Though the Defendant Knew of the Void Service When Made and Failed to Take Any Measures to Prevent the Entry of Judgment Thereunder.—If, in an action, process is served on the defendant's daughter of the same name as herself, and the defendant is at once informed of such service, but does not appear and make any objection, and permits the case to proceed to judgment and a transcript of the judgment to be taken out and levied on her property, whereupon she brings suit in equity for relief, such relief must be granted, but the court has a discretion to refuse to award her costs. (Mich.) Wilcke v. Duross, 394.

Assignment of Judgment.

11. **JUDGMENTS—Assignment.**—Where a judgment must be deemed a chose in action upon which an action may be maintained by an assignee in his own name, an assignment of judgment in writing, although not under seal, is sufficient. (Me.) *Hayes v. Rich*, 314.

12. **JUDGMENTS—Assignment—Witnesses.**—In an action on a judgment brought by an original judgment creditor or by his assignee in his individual capacity, the defendant therein is a competent witness as to all matters material to the issue; and any transaction or proceeding which would effectually render him incompetent in such action will not be tolerated or approved. (Me.) *Hayes v. Rich*, 314.

Foreign Judgments.

13. **JUDGMENTS, FOREIGN—Proof of, to Confer Jurisdiction.**—One claiming authority to sue as trustee under a foreign judgment, must, to maintain his suit, when the defendant denies the jurisdiction of the foreign court to appoint the plaintiff a trustee, not only produce the judgment appointing him, but also prove such pleadings and proceedings as empowered the court to render the judgment. (Ark.) *Swing v. St. Louis Refrigerator etc. Co.*, 38.

14. **JUDGMENT OF ANOTHER STATE—Fraud as Defense—Equitable Defense.**—Although a judgment when sued upon in another state cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment. (N. C.) *Levin v. Gladstein*, 747.

15. **JUDGMENTS OF ANOTHER STATE** will be given the same faith and credit which is given domestic judgments. (N. C.) *Levin v. Gladstein*, 747.

16. **JUDGMENTS OF OTHER STATES—Fraud as Defense—Justice's Jurisdiction.**—In an action upon a judgment of a sister state the defendant may interpose the defense in the justice's court, that the judgment was obtained by fraud practiced upon him. (N. C.) *Levin v. Gladstein*, 747.

JUDICIAL SALES.

1. **JUDICIAL SALE.**—Mere Inadequacy of Price is not sufficient to set aside a sale of decedent's real estate to pay debts. (Ky.) *Costigan v. Truesdell*, 241.

2. **JUDICIAL SALE—Setting Aside After Confirmation.**—Except upon the grounds stated in section 518 of the Civil Code practice, a court is without power to set aside a sale of a decedent's real estate to pay debts after its confirmation. (Ky.) *Costigan v. Truesdell*, 241.

3. **JUDICIAL SALE—Parties.**—A Sale of a Decedent's real estate to pay debts in an action for the settlement of the estate will not be set aside because a person who claims to be a creditor, but who has not established his claim, was not made a party to the proceedings. (Ky.) *Costigan v. Truesdell*, 241.

4. **JUDICIAL SALE.**—Where the Sale of an Equity of Redemption is ordered to pay a decedent's debts, the fact that the order of sale is not executed does not prevent the termination of the statutory right to redeem. (Ky.) *Costigan v. Truesdell*, 241.

5. **JUDICIAL SALE—Rents.**—If a Purchaser of a Decedent's Realty, sold to pay a mortgage and other indebtedness, takes posses-

sion before the expiration of the time for redemption, he becomes liable to the owners for the rents. They are not assets of the estate, but a claim in favor of the husband and heirs of the decedent. (Ky.) *Costigan v. Truesdell*, 241.

6. **JUDICIAL SALE—Right of Possession.**—The Owners of a decedent's estate, sold to pay a mortgage and other indebtedness, are entitled to possession until a receiver is appointed or the period of exemption expires. (Ky.) *Costigan v. Truesdell*, 241.

JURISDICTION.

See Courts; Process.

JURY.

TRIAL—Challenges to Jurors.—A party to an action cannot make a valid exception to the ruling of the court sustaining the other party's objection to a juror where the first party has not exhausted his peremptory challenges, and it appears that the jury chosen to try the case constituted a panel entirely acceptable to both parties. (N. C.) *Ives v. Atlantic etc. R. R. Co.*, 732.

JUSTICE'S COURT.

1. **JUSTICE'S COURT.**—The Filing of a Notice of Appeal from a justice of the peace to the district court under section 1760 of the Code of Civil Procedure must precede, or be contemporaneous with, the service thereof on the adverse party or his attorney, otherwise the district court does not acquire jurisdiction. (Mont.) *State v. District Court*, 522.

2. **JUSTICE'S COURT.**—A Party Wanting to Appeal from a justice of the peace must pursue the statutory method strictly, and a failure to do so does not divest the justice's court of its jurisdiction. (Mont.) *State v. District Court*, 522.

Note.

Libel, liability of corporations for, 721-726.

LIMITATION OF ACTIONS.

Constitutional Law.

1. **CONSTITUTIONAL LAW—Statute of Limitations.**—A statute merely prescribing a period of limitations within which outstanding past due state bonds may be presented for payment and redemption, is not unconstitutional, either as depriving the bondholder of his property without due process of law, or as impairing the obligation of his contract. (Ark.) *Tipton v. Smythe*, 44.

2. **CONSTITUTIONAL LAW—Statute of Limitations.**—The legislature may prescribe a period of limitation within which rights may be asserted, even though no limitation existed when the right accrued, or may shorten the period of limitation which existed when the right accrued, provided the added limitation is reasonable and affords ample opportunity for the assertion of existing rights. (Ark.) *Tipton v. Smythe*, 44.

3. **CONSTITUTIONAL LAW—Limitation of Actions.**—In determining whether a statute of limitations affords a reasonable time

for the assertion of rights existing at the time of its passage, the court must consider the circumstances under which it is to apply. (Ark.) *Tipton v. Smythe*, 44.

4. CONSTITUTIONAL LAW—Statute of Limitations—Notice.—A statute providing for the calling in and payment of certain past due state bonds after six months' public notice before the day fixed for expiration of the time for presenting the bonds for payment, is not unconstitutional as imposing unreasonably short terms as to length of time or adequacy of the notice, either as to resident or nonresident bondholders. (Ark.) *Tipton v. Smythe*, 44.

5. CONSTITUTIONAL LAW—Statute of Limitations.—A statute providing that certain past due state bonds shall be called in and paid upon six months' public notice, and that unless presented within such time the right of presentation and payment shall be barred, is not unconstitutional, as depriving a bondholder, whether resident or nonresident, of his property without due process of law, nor does it impair the obligation of his contract. (Ark.) *Tipton v. Smythe*, 44.

Burden of Proof.

5. LIMITATION OF ACTIONS—Burden of Proof.—If the statute of limitations is set up as a defense, the burden is upon the plaintiff to prove that his action was brought within the time prescribed by such statute. (Ark.) *Swing v. St. Louis Refrigerator etc. Co.*, 38.

State and Municipalities.

6. LIMITATION OF ACTIONS Against the State.—Statutes of limitation do not run against the state in respect to public rights, unless it is expressly within the terms of the statute. (Ill.) *Brown v. Trustees of Schools*, 146.

7. LIMITATION OF ACTIONS—Minor Municipalities.—The rule that statutes of limitation do not run against the state applies in favor of minor municipalities created by it as well as to local governmental bodies in respect to governmental affairs affecting the general public. The exemption extends to counties, towns and minor municipalities in all matters respecting strictly public rights as distinguished from private or local rights, but as to matters involving private rights, they are subject to the statute of limitations to the same extent as individuals. (Ill.) *Brown v. Trustees of Schools*, 146.

8. LIMITATION OF ACTIONS—School Districts.—Statutes of limitation run against trustees of school districts with respect to property held by them in trust for the use of the free public schools of the district, because the people of the state in general have no interest in common with the inhabitants of the school district in the schoolhouse site. (Ill.) *Brown v. Trustees of Schools*, 146.

See Judgments, 7; Mortgages, 7.

LARCENY.

1. LARCENY—Goods Obtained by Trick.—If the owner of goods alleged to have been stolen parts with both the title and the possession to the thief, not expecting the goods to be returned to the owner or to be disposed of according to his directions, neither the taking nor the conversion amounts to larceny, though the owner was induced to part with the title and possession through the fraud or misrepresentation of the thief. (Ill.) *Aldrich v. People*, 166.

2. LARCENY.—If the Owner of Goods Parts with the Possession, but Retains the Title, expecting and intending that the goods shall be returned to him or disposed of in some particular manner agreed upon, the subsequent felonious conversion of the property by the alleged thief relates back and makes the taking and conversion larceny. (Ill.) Aldrich v. People, 166.

3. LARCENY.—Every Larceny Includes a Trespass. (Ill.) Aldrich v. People, 166.

4. LARCENY of Property in Possession of Servant.—The fact that a servant in whose possession property is consents to its taking will not prevent the act being larceny, he having no authority to consent, and the wrongdoer being aware of that fact. (Ill.) Aldrich v. People, 166.

5. LARCENY.—The Asportation Necessary to Larceny may be Effected by an innocent human agency as well as by mechanical agency or by the offender's own hand. (Ill.) Aldrich v. People, 166.

6. LARCENY Effected by Shifting the Checks on Baggage.—If a larceny is effected by shifting the checks on baggage which is in the hands of a transportation company, and thereby an agent of such company is allowed to further the criminal purpose by delivering the baggage to a person not entitled thereto, who receives and converts it to his own use, having in his own mind at all times the felonious intent to steal the property, he is guilty of larceny. (Ill.) Aldrich v. People, 166.

LIBEL AND SLANDER.

1. SLANDER BY CORPORATION.—Corporations may become civilly liable for slander. (N. C.) Sawyer v. Norfolk etc. R. R., 716.

2. SLANDER BY CORPORATION—Act of Servant—Test of Liability.—The liability of a corporation for slander or other malicious tort committed by its servant depends entirely on the relationship of master and servant, and the test of responsibility is whether the slander or tort was committed by authority of the master expressly conferred or fairly implied from the nature of the employment or the duties incident to it, and when the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be referred to the jury to determine whether the tortious act was authorized. (N. C.) Sawyer v. Norfolk etc. R. R., 716.

3. SLANDER BY CORPORATION—Act of Superintendent.—If a person goes to the office of the superintendent of a corporation to get employment, and such superintendent, after telling him that the corporation will not employ him, proceeds to insult and defame him, the corporation is not liable for the slander, as such act is not within the scope of the employment of its superintendent. (N. C.) Sawyer v. Norfolk etc. R. R., 716.

LIS PENDENS.

1. LIS PENDENS Affects not Only a Purchaser from One of the Parties to the suit, but also those who hold under him. (Ga.) Bridger v. Exchange Bank, 118.

2. LIS PENDENS Applies to Purchasers from the Plaintiff as well as to purchasers from the defendant. (Ga.) Bridger v. Exchange Bank, 118.

3. **LIS PENDENS** Applies to a Judgment Creditor whose rights as an encumbrancer are acquired during the existence of the lis pendens; and also to the purchaser of the property at a judicial sale had in execution of the judgment in favor of a person whose interests in the property to be sold are affected by the lis pendens. (Ga.) Bridger v. Exchange Bank, 118.

4. **LIS PENDENS** Begins in Georgia from the filing and docketing of the petition, if followed by the issuance and service of process and due prosecution. (Ga.) Bridger v. Exchange Bank, 118.

5. **LIS PENDENS**—Cross-complaint.—Relative to an affirmative cross-action or cross-complaint, the defendant occupies the position of a plaintiff, and a lis pendens as to the cross-complaint operates against a purchaser from the plaintiff only from the time it is filed. (Ga.) Bridger v. Exchange Bank, 118.

6. **LIS PENDENS**—Laches.—Either the plaintiff or the defendant may lose the benefit of the pendency of lis pendens by failure on his part to prosecute with due diligence. (Ga.) Bridger v. Exchange Bank, 118.

LOST INSTRUMENTS.

EQUITY JURISDICTION—Lost Checks.—A court of equity has jurisdiction to entertain a suit for the recovery of the amount due upon a lost check, not negotiable for lack of indorsement. (N. J. Eq.) Moore v. Durnan, 635.

MANDAMUS.

1. **MANDAMUS**—Discretion of Court.—An application for a writ of mandamus is addressed to the sound judicial discretion of the court, and the circumstances of each case must be considered in determining whether the writ shall issue. After it has issued, however, it is only in a clear case of abuse of discretion that the granting of the writ will be reversed on appeal. (Neb.) Moores v. State, 605.

2. **MANDAMUS** Against Officers to Suppress Gambling.—If prosecutions have failed to close a gambling-house run in open violation of law, the existence of the remedy by complaint and arrest of the offenders does not prevent the issue of a writ of mandamus to compel the mayor and chief of police to perform their duty, and exercise their summary powers to prevent such violation of the laws. (Neb.) Moores v. State, 605.

3. **MANDAMUS**—Motives of Relator.—The fact that one of the relators, suing out a writ of mandamus to compel the closing of a gambling-house openly run in violation of law, admits that his motive in seeking to close such house is the belief that a certain person who is actively assisting in its operation is interested in its profits, is not ground for reversing the judgment granting the issuance of the writ. (Neb.) Moores v. State, 605.

4. **MANDAMUS** to Close Poolroom.—The keeping of a poolroom in open violation of law is such act as may be prevented by a writ of mandamus directed against municipal officers whose duty it is to close such room. (Neb.) Moores v. State, 605.

See Corporations, 8.

MASTER AND SERVANT.*Liability of Employer to Employé.*

1. **RAILROADS—Duty and Liability as to Disabled Cars.**—A railroad company is bound only to exercise due care, through its vice-principals, and through a proper system of timely inspection, to discover disabled cars and notify its trainmen of such condition. When this is done, the risk of handling the cars and carrying them to the shop becomes one of the risks ordinarily incident to the employment assumed with such trainmen. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

2. **RAILROADS—Disabled Cars—Risks Assumed by Trainmen.**—If a car is reported to a railroad brakeman as being out of order or disabled, or is known to him to be in such condition, the burden of ascertaining the defect and source of danger is cast upon and is assumed by him. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

3. **RAILROADS—Disabled Cars—Duty to Employé—Assumption of Risks.**—Although a railway employé is engaged in the hazardous work of handling disabled cars, he does not assume risks created by the negligence of the railroad company in not exercising due care to protect him. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

4. **RAILROADS—Disabled Cars—Assumption of Risk.**—A railroad brakeman engaged in coupling a disabled car to be taken to a repair shop, with notice of its condition, assumes the risk of handling it. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

5. **RAILROADS—Disabled Cars—Assumption of Risks.**—A railroad employé whose duty it is to handle disabled cars, knowing that a certain car is disabled, assumes as one of the ordinary risks of his employment any injury resulting from the disabled condition of such car in the absence of negligence on the part of the railroad company. (Ark.) *Marshall v. St. Louis etc. Ry. Co.*, 27.

Liability of Employer for Tort of Employé.

6. **MASTER AND SERVANT—Tort of Servant.**—A master is not liable for the torts of his servant, unless they are connected with his duties or within the scope of his employment. (Neb.) *Clancy v. Barker*, 559.

MISTAKE.

See Equity, 3-5.

MONOPOLIES.

TRUST—Unlawful Combinations Though There is not a Complete Monopoly.—A combination or scheme to prevent competition between corporations is unlawful, though other persons are engaged in the same business and a complete monopoly thereof will not result, if the tendency is in that direction. (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

See Corporations, 13.

MORTGAGES.*Deed as Mortgage.*

1. **DEED AS MORTGAGE—Evidence to Show.**—If a person acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with the judgment debtor
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to hold the title thus obtained as a security for a loan of money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, is designed simply as security for a loan, and parol evidence is admissible to show the nature of the transaction. (Neb.) *Dickson v. Stewart*, 596.

Assignment and Registration Thereof.

2. **MORTGAGES—Assignment.**—A mortgage delivered to a third person without consideration, in order that he may procure money thereon for the mortgagor, is valid in the hands of such third person's assignee, for the money paid therefor by the latter, although the former fails to pay over the money to the mortgagor. (N. J. Eq.) *Bogart v. Stevens*, 627.

3. **RECORD—Omission to Record Assignment of Mortgage.**—If the assignee of a mortgage fails to record the assignment, knowing that the mortgaged land was held by a real estate dealer with consequent likelihood of sale, he thereby negligently places it in the power of the mortgagee to deceive or mislead a purchaser, who, by law and custom, would have the right to rely on the record. Withholding the assignment from record is a persistent declaration to all persons dealing merely with the title to the realty that the mortgagee owns the debt. (Wis.) *Marling v. Nommensen*, 1017.

4. **RECORD—Failure to Record Assignment of Mortgage.**—If the assignee of a mortgage, knowing the property is in the hands of a real estate dealer and therefore likely to be sold, withholds the assignment from record, he is estopped to assert the mortgage as against a vendee of the land who purchases in good faith and in reliance on his attorneys' examination of the abstract showing only the mortgage, the discharge of which by the mortgagee is at the same time delivered, with the assurance that the note would be surrendered in a few days. (Wis.) *Marling v. Nommensen*, 1017.

Foreclosure and Redemption.

5. **MORTGAGE FORECLOSURE—Delay in Making Sheriff's Deed.**—Where the purchaser at a foreclosure sale goes into possession at the expiration of the one year allowed for redemption, a deed executed on his application therefor nearly four years afterward by the sheriff, as successor of the sheriff making the sale, is valid notwithstanding the delay, no offer to redeem having been made. (Mont.) *McCauley v. Jones*, 538.

6. **MORTGAGE FORECLOSURE—Deed by Sheriff's Successor.**—Under section 1237 of the Code of Civil Procedure, which makes it the duty of the sheriff who conducts a foreclosure sale, or if he is no longer in office, then his successor, to make a deed to the purchaser, any sheriff succeeding the one who makes the deed is the "successor" of such officer. (Mont.) *McCauley v. Jones*, 538.

7. **MORTGAGES — Foreclosure — Redemption — Limitation.**—The right to foreclose a mortgage, and the right to redeem therefrom, are reciprocal, and an action may be brought to redeem at any time before the statutory bar is complete. (Neb.) *Dickson v. Stewart*, 596.

MUNICIPAL CORPORATIONS.

City Charter.

1. **CITY CHARTER.**—The Necessary Effect of Adopting a part of the general charter by a city existing under a special charter is to

place such city, pro tanto, under the general law as the same may be from time to time changed. (Wis.) *Hay v. City of Baraboo*, 977.
Defective Streets and Sidewalks.

2. **DEFECTIVE STREETS—Liability of Lot Owners.**—The policy of the legislature has been so long and firmly entrenched in our system, to make municipalities liable primarily and directly to sufferers from the failure to keep the public ways in a reasonably safe condition for public travel, that nothing short of some unmistakable repeal of the statute on the subject can reasonably be deemed to have been intended to have that effect. (Wis.) *Hay v. City of Baraboo*, 977.

3. **DEFECTIVE SIDEWALKS—Liability of Lot Owners.**—Where a city charter makes it the duty of lot owners to keep the adjacent sidewalks in repair, and provides that persons injured through any defect in a sidewalk arising out of the wrong or negligence of any person other than the city shall exhaust their legal remedies to enforce the private liability before holding the city liable therefor, the liability referred to is that which results from active wrongdoing, and rests upon common-law principles, independently of statutory enactments. (Wis.) *Hay v. City of Baraboo*, 977.

4. **DEFECTIVE SIDEWALKS—Liability of Lot Owner.**—A city charter provision making it the duty of the owners or occupants of premises in front of which sidewalks are located to keep such walks in repair or pay the expenses incurred by the municipality in doing so, does not impliedly make such owners or occupants liable to travelers for injuries occasioned by the walks being out of repair. (Wis.) *Hay v. City of Baraboo*, 977.

5. **DEFECTIVE SIDEWALKS—Giving Notice to City of Injury.**—A notice required by statute to be given the city in case of injury to a person by reason of a want of repair of a sidewalk is a prerequisite to a right to compensation for the injury. (Wis.) *Hay v. City of Baraboo*, 977.

6. **DEFECTIVE SIDEWALK—Change in Procedure for Enforcing Liability.**—A charter provision prohibiting the enforcement of a right of action for a personal injury suffered from a sidewalk being out of repair, except by presentation of the claim to the city council, and, in case of adverse action, appeal to the district court, is permissible under the rule that an ordinary remedy may be taken away if a new one is given in place thereof. (Wis.) *Hay v. City of Baraboo*, 977.

7. **DEFECTIVE SIDEWALK—Giving Notice to City of Injury.**—A charter provision that no action shall be maintained against the city to enforce any tortious liability, unless a notice, signed by the person injured, of the wrong and the circumstances thereof and the damage claimed, shall be presented to the council within ninety days after the injury, is a statute of limitations which extinguishes the right of action upon the expiration of the time specified. (Wis.) *Hay v. City of Baraboo*, 977.

NEGLIGENCE.

1. **PROXIMATE CAUSE.**—Responsible Causation, as applied in the law, is not dependent on time, distance, or a mere succession of events. If an injury is inflicted by an event, and it is found that it has set in motion all the succeeding agencies sharing in the result, then such event, as the efficient producing cause of the injury, is

held to be the proximate cause of the injury. (Wis.) *Cary v. Preferred Accident Ins. Co.*, 997.

2. NEGLIGENCE—Obstructing Sidewalk.—If a street railway company, as a warning to the public, stretches a rope across the sidewalk in plain view while it is repairing its poles placed inside the curbing, and a child between nine and ten years of age runs against such rope, sustaining fatal injury, the company is not guilty of negligence per se, and there can be no recovery against it, since the accident is one that could not reasonably have been expected. (Va.) *Newport News etc. Ry. Co. v. Clark*, 868.

3. TRESPASSERS—Liability for Injury to.—A land owner does not owe to a trespasser, whether adult or infant, the duty of having his land in a safe condition for such trespasser to enter upon. He assumes the risks of the condition of the land, and ordinarily has no remedy for harm happening to him. (Va.) *Walker v. Potomac etc. R. R. Co.*, 871.

4. TRESPASSERS—Duty to.—A land owner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. (Va.) *Walker v. Potomac etc. R. R. Co.*, 871.

See Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Criminal Cases.—A motion for a new trial in a criminal case on the ground of newly discovered evidence will not be granted, especially where the evidence is merely cumulative or where it has been withheld by the moving party. (N. C.) *State v. Lilliston*, 705.

NOTICE.

1. NOTICE.—Possession of Land is Notice of whatever right or title the occupant has. (Ga.) *Bridger v. Exchange Bank*, 118.

2. NOTICE.—The Continued Possession of the Grantor After the Execution of a Conveyance gives the world notice of his rights, as where his conveyance was in effect given as security for indebtedness and he took a bond for a reconveyance on its payment. (Ga.) *Bridger v. Exchange Bank*, 118.

NUISANCE.

1. NUISANCE—Legislative Authority.—To escape liability for a nuisance created incidentally to an act, the performance of which is authorized by statute, it must appear that the particular act complained of, and immunity from its consequences, were within the contemplation of the legislature at the time of enacting the statute. (Va.) *Townsend v. Norfolk Ry. etc. Co.*, 842.

2. NUISANCE—Legislative Authority.—While the legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly granted, and it must appear that the legislature contemplated the

doing of the very act which occasioned the injury. (Va.) *Townsend v. Norfolk Railway etc. Co.*, 842.

See Constitutional Law, 3; Street Railways.

OFFICERS.

CONSTITUTIONAL LAW—Property Qualifications of Officers of Drainage Districts.—A statutory requirement that the directors of a drainage district shall be freeholders is not in contravention of a constitutional limitation forbidding a property qualification for any office of public trust. (Kan.) *State v. Monahan*, 224.

OPTION TO SELL STOCK.

See Corporations, 14-16.

PARENT AND CHILD.

Services by Adult Child.

1. **PARENT AND CHILD—Services Rendered by Adult Child—Compensation.**—If an adult child removes from the home of his parent, marries, and afterward renders personal services to his parent which are voluntarily accepted, a promise on the part of the parent to pay therefor will be implied. (N. C.) *Winkler v. Killian*, 694.

2. **PARENT AND CHILD—Services by Adult Child—Compensation.**—In the absence of fraud or gross neglect, an adult child's claim for personal services rendered his parent after arriving at majority should be reduced by the amount actually received by such child in the use and management of the parent's property, and not by what he should have received by more diligent management. (N. C.) *Winkler v. Killian*, 694.

Injury to Child.

3. **NEGLIGENCE—Injury to Minor Child Employé—Misrepresentation as to Age.**—Although a minor child applying for employment misrepresents himself to be of age, and such representation is believed and relied upon by his employer, such facts do not bar the minor from recovering for injury negligently inflicted upon him by his employer. (Mo.) *Matlock v. Williamsville etc. Ry. Co.*, 481.

4. **NEGLIGENCE—Injury to Minor Child Employé—Misrepresentation of Age—Estoppel to Recover.**—Although a minor child applying for employment misrepresents himself to be of age, and such representation is believed and relied upon by his employer, otherwise he would not have been given employment, these facts do not bar by estoppel in pais the right of either the minor employé or of his parent to recover for injury inflicted through negligence upon such minor by his employer. The action is one of tort, and does not arise out of a violation of contractual relations. (Mo.) *Matlock v. Williamsville etc. Ry. Co.*, 481.

See Death.

Note.

Parent and Child, constructive trust against the one in favor of the other, 793.

PARTIES.

TRIAL—New Parties.—Although a statute provides for intervention before trial only, yet the court has power to bring other

parties before it, even after trial, when satisfied that their presence as parties is necessary to a proper determination of the case. (Neb.) *Brown v. Brown*, 568.

PARTITION.

In General.

1. **PARTITION—Expenses of Real Estate Agents in Negotiating Sales.**—If real property is directed to be partitioned by sale, and real estate agents are employed to procure purchasers, the commissions of such agents should not be directed to be paid out of the aggregate fund, but must be taken care of by those employing them. (Tenn.) *Rutherford v. Rutherford*, 799.

2. **PARTITION OF PERSONALTY—Injunction—Receiver.**—If, pending a proceeding for the partition of personalty, the defendant threatens the destruction or removal of the property, he may be enjoined or a receiver may be appointed. (N. C.) *Thompson v. Silverthorne*, 727.

Leaseholds.

3. **PARTITION—Reimbursement of Moneys Paid for Lessee's Interest.**—If it becomes proper to partition property by sale, and such sale cannot be effected without first inducing persons having leasehold interests to surrender their leases, moneys paid to secure such surrender may be directed to be reimbursed out of the aggregate fund. (Tenn.) *Rutherford v. Rutherford*, 799.

Remainders and Life Estates.

4. **PARTITION.**—Remaindermen cannot Compel Partition or a Sale for Partition where their rights are purely contingent and it is not possible to say who are the ultimate owners of the remainder. (Tenn.) *Rutherford v. Rutherford*, 799.

5. **PARTITION.**—Life Tenants may Have a Partition or a Sale for Partition, though it is not possible at the time to know in whom the estate in remainder will ultimately vest. (Tenn.) *Rutherford v. Rutherford*, 799.

6. **PARTITION BY SALE** Will not be Decreed where there are contingent remainders, unless it is made to appear that it will be for the benefit not only of the life tenant but of the whole estate. (Tenn.) *Rutherford v. Rutherford*, 799.

7. **PARTITION Between Life Tenants and Contingent Remaindermen.**—Where there are life tenants and contingent remaindermen, partition by sale may be made by having the value of the estates for life ascertained by appraisal and paid over to the life tenants, and the balance of the proceeds paid into court and invested in permanent securities for the benefit of such persons as ultimately become entitled to the estate in possession when the contingency on which it turns shall be ascertained by the happening of the event. (Tenn.) *Rutherford v. Rutherford*, 799.

Sale and Division of Proceeds.

8. **PARTITION by Sale** may be Decreed not only where partition in kind cannot be made, but also where the land is so situated that partition by sale is manifestly for the advantage of the parties. (Tenn.) *Rutherford v. Rutherford*, 799.

9. **PARTITION BY SALE** May be Decreed where the land is so situated with respect to two lines of railway that it is to the

advantage of the parties to sell it in small parcels for factory purposes, and this though there are contingent estates. (Tenn.) *Rutherford v. Rutherford*, 799.

Estates of Decedents—Power of Executor or Trustee.

10. PARTITION—Power Conferred upon Executors or Trustees to Make, When Exclusive.—If a testator by his will vests in his executors authority to partition his real property among his heirs and devisees, a court of equity will not take the execution of the trust out of their hands unless they have abused it or have for an unreasonable time refused to exercise it. (Ill.) *Fischer v. Butz*, 160.

11. PARTITION—Dismissal of Bill for Because Power to Partition is Vested in Executors.—A bill filed for the partition of real property of a testator or decedent will be dismissed where his executors are, by the will, vested with authority to make partition, and only four months and a half have elapsed since the death of the testator and but three and a half months since the admission of the will to probate. They should be allowed time to ascertain whether and to what extent the estate is indebted, and to so inform themselves as to intelligently exercise their discretion. (Ill.) *Fischer v. Butz*, 160.

12. PARTITION, Exercise of Power of, by Executors Though There are Conflicting Claims of Title.—A claim by a woman that she is the widow of a testator by virtue of a common-law marriage does not constitute a sufficient ground for the taking of jurisdiction by a court of equity of a suit to partition his property commenced by one of his heirs, where the executors are, by the will, given power to make partition and have not refused nor unreasonably delayed to exercise their power. (Ill.) *Fischer v. Butz*, 160.

13. PARTITION.—Jurisdiction of the Court to Make Partition of the Property of a Decedent, he having vested his executors with power to partition it, cannot be sustained on the ground that when the suit for partition was commenced, it could not be known whether the personal property would be sufficient to pay his debts and legacies. It will be no hardship to the heirs and devisees if they are compelled to delay partition until the expiration of the time allowed for filing claims in the probate court against the estate. (Ill.) *Fischer v. Butz*, 160.

PARTNERSHIP.

1. PARTNERSHIP—Agreement for Joint Adventure and a Sharing of the Profits, When does not Create.—An agreement between B., T., and G., that they will engage in raising sugar beets, that T. is to manage the enterprise and receive therefor a stated sum, that B. is to contribute his counsel and advice, that G. is to advance the capital, that the profits shall be equally divided among the three, that G. shall receive no return of his advances until all the other obligations are met, and in case there is not enough to meet these, B. and T. will each be responsible for one-third of the deficiency, does not make G. a partner, and an action cannot be sustained against him as such where it was clearly understood that neither of the others had any authority to make contracts which would bind G., nor the authority to make contracts to bind them, and that his liability should be limited to his advances. (Mich.) *Brotherton v. Gilchrist*, 397.

2. PARTNERSHIP, When Created and When not.—Though there is a partnership whenever there is a community of property, of interest, and of profits, there is no partnership if any of these elements is missing. (Mich.) *Brotherton v. Gilchrist*, 397.

3. PARTNERSHIP, Essentials of.—The essentials requisite to constitute the relation of partners are a community of interest between the parties for the purpose of profit. (Md.) *Mogart v. Smouse*, 367.

4. PARTNERSHIP Between the Parties is a Matter of Intention to be proved by their express agreement or inferred from their acts. (Md.) *Mogart v. Smouse*, 367.

5. PARTNERSHIP in Lands, When Exists.—An agreement by two or more persons to buy land and sell it and share the profits or profits and losses constitutes them partners for that venture, and entitles either of them to an accounting in equity for his share of the joint transaction. (Md.) *Mogart v. Smouse*, 367.

6. PARTNERSHIP in Lands, Action at Law for a Share of the Profits of.—If two persons have entered into a partnership to buy and sell land, an action at law cannot be maintained by one of them against the other for a share of the profits of the venture, there not appearing to have been any settlement of accounts between them. (Md.) *Mogart v. Smouse*, 367.

7. PARTNERSHIP—Loan to Member of Firm—Recovery as Money had and Received.—If a third person, by mortgage or otherwise, procures money and furnishes it to a person for the use of a partnership of which he is a member, he, as a member of such firm, becomes bound in equity and good conscience to repay such debt and such loan may be recovered as for money had and received, unless all or some part of it is barred by limitation and as to the part not so barred recovery may be had. (Me.) *Jones v. Jones*, 328.

See Frauds, Statute of, 9, 10.

Note.

Partnership, agency as a test of, 404, 406.

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PARTY-WALLS.

1. **PARTY-WALLS—Charge on Land.**—An agreement by an adjacent lot owner to pay part of the cost of a party-wall when he commences to use it creates a charge in the nature of an equitable lien upon his part of the lot on which the wall is erected, which is enforceable in equity. (Ark.) Rugg v. Lemley, 17.

2. **PARTY-WALLS—Covenant Running With Land.**—An agreement of an adjoining owner to pay for the use of a party-wall is a covenant running with the land, and the right to recover the sum agreed upon passes to the grantee of the original builder under his deed. (Ark.) Rugg v. Lemley, 17.

PAYMENT.

1. **PAYMENT.**—The Acceptance of a Check is in the nature of a conditional payment, which becomes complete when the amount due on it is actually paid. Such payment relates back to the time of the delivery of the check. (Wis.) Jacobson v. Bentzler, 1052.

2. PAYMENT by Check.—The mere delivery and acceptance of a check is not payment nor evidence of payment. (Kan.) *Interstate National Bank v. Ringo*, 176.

3. PAYMENT.—Credits Made Upon Books of Account can have no greater effect as evidence of payment than receipts given acknowledging payment, and the latter, when exchanged for checks, do not show that absolute payment was intended. (Kan.) *Interstate National Bank v. Ringo*, 176.

PLEADING.

1. TRIAL.—Amendment of Petition After Trial may be permitted and the case reopened for the trial of the issues tendered by such amendment when necessary to a proper determination of the case. (Neb.) *Brown v. Brown*, 568.

2. PRACTICE.—An Amendment may be Made to a Motion to Set Aside a Judgment in which other grounds are added to the motion. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

3. PLEADING, Duplicity in.—If one who has contracted to erect a building for another has two causes of action against the latter, one for a definite sum of money due for work done, and the other for preventing the plaintiff from going on and completing his contract, and states both causes in a single count in his declaration, it is bad for duplicity. (Md.) *Milske v. Steiner Mantel Co.*, 364.

4. BILL OF PARTICULARS—Sufficiency.—A statement of particulars is sufficient if it fairly and plainly gives notice to the adverse party of a cause of action or defense not sufficiently described in the notice, declaration of other pleading. (Va.) *Tidewater Quarry Co. v. Scott*, 864.

POLL TAX.

See Highways.

POOLROOM.

See Mandamus, 4.

PRETERMITTED CHILD.

See Wills, 9.

Note.

Priest and Parishoner, constructive trust against the one in favor of the other, 795.

PRINCIPAL AND AGENT.

1. AGENCY—Undisclosed Principal—Setoff.—If an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of the agency but supposed that the agent dealt for himself, such suit is subject to any defense or setoff acquired by a third person against the agent before he had notice of the principal's rights, and this rule applies not only to the sale of goods, but as well to other contracts where the agent is authorized to collect money for his undisclosed principal. (Ark.) *Frazier v. Poindexter*, 33.

2. AGENCY—Knowledge of Undisclosed Principal—Setoff.—If a person who deals with an agent, acting in his own name, knows, or has reason to believe, that he is dealing with an agent, though he does not know who the principal is, he cannot plead against such principal a defense or setoff which he has against the agent. (Ark.) *Frazier v. Poindexter*, 33.

3. AGENCY—Setoff.—If an agent accepts notes for collection under an agreement that he will pay the money, when collected, over a third person, he has no right to use it as a setoff on a demand due him from his principal, disclosed or undisclosed. (Ark.) *Frazier v. Poindexter*, 33.

See Brokers.

Note.

Principal and Agent, constructive trust in favor of the former against the latter, 795.

PROBATE COURTS.

See Courts, 3, 4.

PROCESS.

JURISDICTION, Necessity of Return Supporting.—To authorize judgment against a person who has not appeared or answered or otherwise submitted himself to the jurisdiction of the court, there must be not only service upon such defendant, but a legal return of service. (Ga.) *Albright-Pryor Co. v. Pacific Selling Co.*, 108.

RAILROADS.

1. RAILROADS—Regulation of by State Commission.—The state corporation commission, in the exercise of the police power of the state, has power and authority to require two railroad companies to make connection at a certain station at a certain time. (N. C.) *North Carolina Corp. Com. v. Atlantic Coast Line R. R. Co.*, 636.

2. RAILROADS—Duty to Drunken Trespasser.—Where the yardmaster and foreman of the switch crew of one railroad company see a passenger of another railroad company aroused from a drunken stupor and put off a car on the depot platform at night, and a few minutes later find him drunk and asleep between the tracks in their switchyard, and thereupon arouse him and start him walking through the network of tracks and switches toward the highway, and a short time thereafter he lies down and goes to sleep on one of the tracks, where he is struck by their switch engine, the railroad company is answerable for his injuries. (Ky.) *Cincinnati etc. Ry. Co. v. Marrs*, 28.

3. RAILROADS—Turntables.—A railroad company is not liable for an injury inflicted on a trespassing infant of tender years by an unlocked and uninclosed turntable on its premises in an open and unoccupied field some distance from the public highway. (Va.) *Walker v. Potomac etc. R. R. Co.*, 871.

4. RAILROADS—Turntables.—The fact that an unfastened railroad turntable located on unoccupied land belonging to the railroad company is attractive to trespassing infants does not render the company liable for injury to them while playing with such turntable,

nor does the maxim "Sic utere tuo ut alienum non laedas" apply in such case. (Va.) Walker v. Potomac etc. R. R. Co., 871.

5. **TURNTABLE CASES.**—Doctrine of turntable cases disapproved and rejected. (Va.) Walker v. Potomac etc. R. R. Co., 871.

See Carriers; Eminent Domain; Master and Servant; Rewards; Street Railways.

RECEIVERS.

1. **RECEIVERS—Foreign Insurance Companies—Assets.**—A receiver will not be appointed for a foreign insurance company when it has no assets or property within the state, other than assessments to become due against its policy-holders therein. (N. C.) Blackwell v. Mutual Reserve etc. Assn., 677.

2. **INSURANCE—Receivers.**—If a contract of insurance expressly provides that a certain percentage of the assessments thereon shall be set apart for the purpose therein set forth, the court cannot, through a receiver, compel the payment of an assessment to be appropriated to the payment of plaintiff's claim in violation of the terms of the contract and the rights of policy-holders. (N. C.) Blackwell v. Mutual Reserve etc. Assn., 677.

RECOGNIZANCE.

1. **RECOGNIZANCE.**—Oyer is Demandable of a record and recognizance. (W. Va.) State v. Dorr, 915.

2. **RECOGNIZANCE—How Entered into.**—A recognizance is an obligation entered into by the prisoner and his recognizers appearing before the court or justice and acknowledging themselves to be indebted to the state in a certain sum, upon a certain condition, which is entered and becomes a part of the record. (W. Va.) State v. Dorr, 915.

3. **RECOGNIZANCE—Manner of Taking Forfeiture.**—A recognizance conditioned that one accused of crime shall appear before the circuit court on the first day of a specified term, and not depart thence without leave of court, can be forfeited only by calling him on the recognizance sometime during the term, and entering his default of record if he fails to appear. (W. Va.) State v. Dorr, 915.

4. **RECOGNIZANCE—Time of Taking Forfeiture.**—If the term of court at which one accused of crime is recognized to appear adjourns without his default being entered, the recognizance cannot thereafter be forfeited, and the recognizers are released from liability. (W. Va.) State v. Dorr, 915.

RECORDS.

1. **RECORDS—Effect of Omission to Record Instrument.**—Since the adoption of the system of public registry of conveyances, the custom of prompt registration has been so nearly universal that omissions may well be considered neglect of those precautions customarily taken to assert a grantee's rights in the land, and people generally have become accustomed to believe that all rights will so appear and to act confidently on that assumption; hence such conduct is to be expected by one holding an unrecorded conveyance. (Wis.) Marling v. Nommensen, 1017.

2. RECORDS.—A Statute Declaring Void any Unrecorded Conveyance as against a subsequent purchaser whose conveyance shall first be duly recorded does not exclude all other adverse effect than that which it denounces against one who neglects to place his conveyance on record. (Wis.) *Marling v. Nommensen*, 1017.

See Mortgages, 2-4.

REFORMATION OF INSTRUMENTS.

DEEDS—Reformation of for Fraud.—If a grantor agrees in writing to convey certain lands free from encumbrances, and the grantee, after accepting the deed, discovers that there have been fraudulently inserted therein certain restricting covenants in violation of the terms of the agreement for the deed, with a provision that such covenants should be construed as running with the land, and that upon a violation of either of them the premises should revert to the grantor or his heirs, the grantee is entitled to have the deed reformed by expunging such covenants from it, although they might have been discovered by an examination of the deed before its acceptance. (N. J. Eq.) *Lloyd v. Hulick*, 624.

RELEASE.

See Torts, 2.

REPLEVIN.

REPLEVIN for Property in Custody of the Law.—Replevin can be sustained for property under levy under attachment, though the writ issue in an action against a person other than the owner of such property. (Md.) *Baltimore etc. Ry. Co. v. Klaiff & Co.*, 363.

RESCISSION.

See Contracts, 11.

RES GESTAE.

See Evidence, 6, 7.

REVERSAL OF JUDGMENT.

See Judgments, 2.

REWARDS.

1. RAILROADS—Power to Offer Rewards.—A railroad company has implied power to offer a general reward for the arrest and conviction of any person found maliciously placing obstructions upon its tracks, changing switches or doing any act for the purpose of causing derailments or the wreck of trains. (Ark.) *Arkansas etc. Ry. Co. v. Dickinson*, 54.

2. RAILROADS—Power of General Manager to Offer Reward.—The general manager of a railroad company has authority to offer a general reward for the arrest and conviction of any person found maliciously obstructing its tracks. (Ark.) *Arkansas etc. Ry. Co. v. Dickinson*, 54.

3. RAILROADS—Offer of Reward by General Manager—Notice.—Evidence that a person who offered a reward for the arrest and conviction of any person found maliciously obstructing the railroad track had acted for three years as the general superintendent of a railroad company, that notices offering such reward were posted at every station of such company, and must have been seen by its president, that such notices were furnished to such manager by the vice-president of the company, and that the act of such manager in offering the reward was never repudiated by the company, is sufficient to sustain a finding that the other officers of the railroad company were cognizant of and ratified the act of offering such reward. (Ark.) *Arkansas etc. Ry. Co. v. Dickinson*, 54.

4. REWARDS—Conviction as Evidence.—If a railroad company offers a reward for the arrest and conviction of any person found maliciously placing obstructions on its track, the record of the conviction of a person for such offense is admissible, and prima facie evidence of his guilt in an action to recover the reward. (Ark.) *Arkansas etc. Ry. Co. v. Dickinson*, 54.

SALES.

1. SALE OF PROPERTY F. O. B. Cars, Title to, When Does not Pass to the Purchaser.—Under an agreement for the sale and purchase of all the coal f. o. b. cars which the purchaser may require during a specified year for the use of an illuminating company, mine weights to govern all settlements, no title passes to the purchaser until the coal is delivered on such cars, and he hence cannot recover for the unlawful confiscation of the coal before it arrives at the railroad tracks. Nor is this result affected by the sending of postal cards by the seller to the purchaser announcing the shipment of the coal. (Mich.) *Detroit Southern R. R. Co. v. Malcomson*, 390.

2. RESCISSION OF CONTRACT of Sale—Duty of Doing Equity. One who seeks by a bill in equity to rescind a contract of sale for fraud on the part of the purchaser must, as a condition precedent, offer to repay the purchase price. (Ill.) *Dunbar v. American Telephone etc. Co.*, 132.

SCHOOL DISTRICT.

See Limitation of Actions, 8.

SEDUCTION.

1. SEDUCTION Under Promise of Marriage.—Sufficiency of Evidence.—In a criminal prosecution for seduction under promise of marriage, it is not necessary to show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces, and it is sufficient if the jury, under the evidence, can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt. (N. C.) *State v. Ring*, 759.

2. SEDUCTION Under Promise of Marriage is Accomplished when the prosecutrix trusted to the defendant's promise that he would never forsake her and to his promise of marriage when she yielded to his embraces to her ruin; the fact that the promise to marry existed long before the seduction can make no difference if he afterward took advantage of it to effect his purpose. (N. C.) *State v. Ring*, 759.

3. **SEDUCTION, Averment of Plaintiff's Chastity, What Amounts to.**—If, in an action for the seduction of the plaintiff, the complaint avers that she was seduced by the defendant, this is equivalent to an averment of her previous chastity. (Mich.) *Greenman v. O'Riley*, 466.

4. **SEDUCTION, Promise, Deceit, Artifice, and Influence Sufficient to Sustain Action for.**—If a man states to a girl seventeen years of age that he likes her the best of any girl he ever knew, that she will never be sorry and never regret it, and that she can always live with him and be happy, he may be held liable for her seduction under a statute creating liability for seduction under such "promise, artifice or influence as will overcome the scruples of a chaste woman." (Mich.) *Greenman v. O'Riley*, 466.

5. **SEDUCTION—Chastity, Want of, Evidence of, When Admissible.**—Under the General Issue, the plaintiff's want of chastity is admissible in actions of seduction without giving any notice of intention to offer such evidence, and this remains true though the trial court has adopted a rule declaring that an affirmative defense must be clearly set forth in the notice added to the defendant's plea. (Mich.) *Greenman v. O'Riley*, 466.

6. **SEDUCTION—Presumption of Chastity.**—In an action for seduction previous chastity is presumed. (Mich.) *Greenman v. O'Riley*, 466.

7. **SEDUCTION, Woman Allowed to Maintain an Action for.**—Under a statute declaring that it shall not be necessary in an action for seduction to allege or prove any loss of service in consequence thereof, but if the female be a minor when seduced, action may be by her father, mother, or guardian, and if of full age, the action may be by the father or any other relative who shall be authorized by her to bring the same, there is given a right of action which may be enforced by her in her own name. (Mich.) *Greenman v. O'Riley*, 466.

8. **SEDUCTION, Necessity of Chastity to Support Action for.**—Under a statute giving to a woman the right to sue for her seduction, it is fatal to the action that she was not a chaste woman at the time of the alleged seduction. (Mich.) *Greenman v. O'Riley*, 466.

9. **SEDUCTION is Correctly Defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles, which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to sexual embraces of the person accused.** (Mich.) *Greenman v. O'Riley*, 466.

SELF-DEFENSE.

See Assault, 1; Homicide, 6.

SETOFF.

In General.

1. **SETOFF—Damages Readily ascertainable to by calculation or computation may be set off against a liquidated demand.** (Va.) *Tidewater Quarry Co. v. Scott*, 864.

2. **SETOFF—What Constitutes.**—It is not necessary to constitute a valid setoff, that a price should be agreed upon for an article sold and delivered. (Va.) *Tidewater Quarry Co. v. Scott*, 864.

3. **SETOFF—When Allowed.**—If indebitatus assumpsit can be maintained for the value of property converted, such value may be allowed as a setoff. (Va.) *Tidewater Quarry Co. v. Scott*, 864.

4. **SETOFF—Liquidated Demand.**—In an action at law for a liquidated demand, the defendant may set off the value of goods belonging to him which the plaintiff has tortiously converted to his own use. (Va.) *Tidewater Quarry Co. v. Scott*, 864.

Against Estate of Decedent.

5. **SETOFF Against Estates of Deceased Persons.**—Demands on which causes of action arise subsequently to decedent's death are not proper subjects of setoff against demands or causes of action arising in decedent's lifetime. (Me.) *Rich v. Hayes*, 322.

6. **SETOFF Against Estate of Decedents.**—Claims against an estate purchased after his death cannot be set off in an action against the purchaser thereof for a debt due the decedent, nor even on a debt created after the death of the decedent. (Me.) *Rich v. Hayes*, 322.

See *Executors and Administrators*, 19, 20.

SHELLEY'S CASE.

See *Wills*, 8.

SLANDER.

See *Libel and Slander*.

Note.

Slander, liability of corporations for, 726, 727.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE—Injunction, Bill for, When Equivalent to a Suit for.—A bill enjoining a telephone company from charging a higher rate for its telephones than is specified in a contract is equivalent to a bill for the specific performance of such contract, and the suit must be determined by the application of the same principles. (Md.) *Maryland Telephone etc. Co. v. Simons Sons Co.*, 346.

See *Contracts*, 2.

STATE.

See *Limitation of Actions*, 6-8.

STATUTE OF FRAUDS.

See *Frauds*, *Statute of*.

STATUTE OF LIMITATIONS.

See *Limitation of Actions*.

STATUTES.

Title and Subject of Act.

1. **CONSTITUTIONAL LAW—Subject and Title of Statutes.**—If all the provisions of a statute fairly relate to the same subject, have a

natural connection with it, and are the incidents or means of accomplishing it, the subject is then single, and, if sufficiently expressed in the title, the statute is valid. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

2. CONSTITUTIONAL LAW—Subject and Title of Statutes.—A statute entitled, "An act to prevent frauds between attorneys, clients, and defendants; making agreements between attorney and client a lien upon the cause of action," and providing for an attorney's lien upon his client's cause of action, stating the nature and character of the contract authorized to be entered into between attorney and client and made the basis of the lien, providing for notice and other incidents for making such lien effective, and that defendant who ignores such notice and lien and settles with the client without the attorney's consent shall be liable to such attorney for his interest in the litigation according to the contract, contains no provisions which do not clearly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, clearly germane to subject expressed in the title, and such statute is constitutional and valid. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

3. CONSTITUTIONAL LAW—Title of Statutes.—A statute cannot be declared unconstitutional for the reason that it fails to clearly express the subject by its title, unless it clearly violates that command of the constitution, and the mere generality of the title will not vitiate the statute unless such title is of such nature as to compel a conviction that it was designed to mislead as to the subject dealt with. (Mo.) *O'Connor v. St. Louis Transit Co.*, 495.

4. CONSTITUTIONAL LAW—Statutes, Title of, When Embraces but One Subject.—The title, "An act to prohibit traffic in nontransferable signature tickets issued by common carriers, and to require common carriers to redeem unused or partly used tickets, and to provide punishment for the violation of this act," does not embrace more than one subject, nor cover incongruous legislation. (Tenn.) *Samuelson v. State*, 805.

5. CONSTITUTIONAL LAW—Statutes, Title of, When Embraces but One Subject.—In the title, "An act to prohibit the sale of tickets issued by common carriers save through their authorized agents, and require common carriers to redeem tickets issued by them when wholly, or partly used," two subjects are not expressed, but rather two branches, naturally and intimately allied, of the same subject. (Tenn.) *Samuelson v. State*, 805.

Construction.

6. STATUTES—Construction.—Two chapters of the Revised Statutes of a state relating to the same subject, though having no immediate connection with each other, should be construed together. Hence one chapter of such statutes enumerating what are to be deemed intoxicating liquor must be construed in connection with the words "intoxicating liquor" as used in another chapter of such statutes. (Me.) *State v. Frederickson*, 295.

7. CONSTITUTIONAL LAW—Statute, Construction of.—If, in an act to prohibit the sale of tickets of common carriers except by their authorized agents, one of the sections speaks of a ticket or other evidence of the passenger's right to travel, it is evident that this latter phrase is used simply as the equivalent of ticket. (Tenn.) *Samuelson v. State*, 805.

8. STATUTE, Construction of.—The grammatical sense of the words employed in a statute is usually to be adopted, but if there is ambiguity, or room for more than one interpretation, the rules of grammar may be disregarded, if strict adherence to them will give rise to a repugnance or absurdity or defeat the purpose of the legislature. (Tenn.) *Samuelson v. State*, 805.

9. STATUTE, Construction in Favor of Constitutionality of.—If a statute admits of two constructions under one of which it must be pronounced unconstitutional and void, and the other constitutional and valid, the latter will be adopted. (Tenn.) *Samuelson v. State*, 805.

Implied Repeal.

10. STATUTES.—Implied Repeals of Statutes are never favored. Every rule of construction is to be applied without efficiently harmonizing provisions seemingly in conflict, before holding that there is any irreconcilable inconsistency between them. (Wis.) *Hay v. City of Baraboo*, 977.

STREET RAILWAYS.

1. STREET RAILWAYS—Public Service Corporations—Duties.—An electric street railway company is a public service corporation, and as such it has duties both of a public and private nature. It must perform its public duties, but in the performance of its duties not of a public nature which are incidental to those of a public character, it stands upon the footing of a private corporation, and with respect to the duties of the first class, in doing that which under the law it is required to do, it cannot be considered as doing an unlawful act, and if a lawful act is done without negligence, any injury which it occasions is *damnum absque injuria*. (Va.) *Townsend v. Norfolk Railway etc. Co.*, 842.

2. STREET RAILWAYS—Site for Power-house.—While an electric street railway cannot be operated without a power-house, yet the selection of a site therefor, and the generation of power, are mere incidents to the operation of the road and mere private business with which the public has no concern, and in such business the company stands on the same footing as a mere individual, with no special privileges. (Va.) *Townsend v. Norfolk Railway etc. Co.*, 842.

3. STREET RAILWAYS—Location of Power-house—Nuisance.—A grant of power to an electric street-car company to construct and operate its road in a city gives no authority to locate its power-house where it will be a nuisance, nor to so locate it as, by its use, to unreasonably interfere with and disturb the peaceable and comfortable enjoyment of others in their property; and if injury is inflicted upon others by such location and operation of a power-house, the company must respond in damages. (Va.) *Townsend v. Norfolk Railway etc. Co.*, 842.

Note.

Streets, public, constitutionality of statute imposing liability on property owners, 994, 995.

public, defects, liability of person creating, 994.

public, excavations in, liability of property owner for, 994.

public, notice to abutting owner to make repairs, 996.

public, property owner is liable for defects caused by himself, 994.

public, property owner is not liable at common law to repair, 993.

Streets, public, statutes imposing duty to keep in repair do not make property owner personally liable for injuries, 995.

public, statutes imposing liability on property owners, interpretation and effect of, 995.

public, trap-doors, manholes, etc., liability for injuries due to, 994.

SUCCESSION.

See Descent and Distribution.

SUICIDE.

SUICIDE—Attempt to Commit.—In the absence of an express statute an attempt to commit suicide is not an indictable offense. (Me.) May v. Pennell, 334.

SUNDAY CONTRACTS.

1. SUNDAY CONTRACT—Subsequent Completion of Transaction. Where an agreement for the loan of money is made on Sunday, including the signing of the contract, and the delivery of a check for the amount of the loan, the transaction is not relieved from the condemnation of the Sunday law by the fact that the check is not paid and the contract not acknowledged nor recorded until a later day. (Wis.) Jacobson v. Bentzler, 1052.

2. SUNDAY CONTRACT—Loan of Money—Ratification.—The loaning of money is within the meaning of a statute prohibiting the doing of business on the first day of the week, and a contract therefor is void and not susceptible of ratification. (Wis.) Jacobson v. Bentzler, 1052.

3. SUNDAY CONTRACT—Manner of Reaching Invalidity.—In an action to enforce a loan made on Sunday, the fact that the defendant in his answer did not assert the invalidity of the contract does not preclude him from insisting that the agreement cannot be enforced. (Wis.) Jacobson v. Bentzler, 1052.

4. SUNDAY CONTRACT.—Upon the Grounds of Public Policy. all the parties to a Sunday contract are deemed equally guilty, and are denied the usual remedies of the law for its enforcement. (Wis.) Jacobson v. Bentzler, 1052.

Note.

Surety, creditor does not owe the duty to, to exercise active vigilance, 86.

creditor, failure of to present claim against estate of deceased debtor, 86.

creditor, failure of to present claim against estate of the debtor in bankruptcy, 88.

creditor, failure of to sue administrator of deceased debtor, 86, 87.

creditor is not bound to sue on the principal debt, 85.

creditor need not sue insolvent debtor, 93.

creditor, notice or request to, to sue debtor, form of, 94.

creditor, request that he sue debtor, effect of, 89, 90.

forbearance of creditor to sue debtor, 88-93.

notice of default of debtor is not necessary to liability of, 84.

passive conduct of creditor does not release, 86.

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 release of by creditor's failure to exercise care and diligence respecting collateral securities, 100.
 release of by creditor's lien becoming lost by operation of law, 101, 102.
 release of by creditor's losing a lien by negligence, 101.
 release of by creditor's making payments to debtor which he could have withheld, 95.
 release of by creditor's refusal to sue debtor, 93.
 release of by creditor's surrendering securities, 95.
 release of where creditor is a bank, by its failure to apply deposits, 98, 99.
 right of action of against the principal, when accrues, 87.
 suit by to compel creditor to sue debtor, 89.

TAXATION.

1. **CONSTITUTIONAL LAW—Working Roads—Double Taxation.** A statute providing for the working on public highways or roads by labor is not unconstitutional as double taxation. (N. C.) *State v. Wheeler*, 700.
2. **CONSTITUTIONAL LAW—Double Taxation.**—No constitutional prohibition exists against double taxation. (N. C.) *State v. Wheeler*, 700.
3. **CONSTITUTIONAL LAW—Taxation.**—The fourteenth amendment to the constitution of the United States does not require equality in levying taxation by a state; that matter is governed entirely by the provisions of the state constitution. (N. C.) *State v. Wheeler*, 700.
4. **TAXATION.**—Time is not Money nor is labor property in the sense that they can be liable for a property tax. (N. C.) *State v. Wheeler*, 700.

See Highways.

TELEPHONES.

1. **TELEPHONES—Construction of Contract and Ordinance for the Furnishing of.**—A contract and a municipal ordinance for the supplying of telephones means such as will furnish the most effective service then in use. (Md.) *Maryland Telephone etc. Co. v. Simon Sons Co.*, 346.
2. **AN INJUNCTION** Should be Denied When Its Enforcement will Render a Service Corporation Insolvent and unable to proceed with its business. Therefore, a bill against a telephone corporation to compel it to furnish telephones and telephonic service at the rate specified in a contract and in a municipal ordinance should be dismissed and the complainants left to their remedy at law, if it is not possible to furnish the service at the rate specified and to do so will make the company insolvent and unable to perform its obligation to the public. (Md.) *Maryland Telephone etc. Co. v. Simon Sons Co.*, 346.

TENANCY IN COMMON.

Action for Possession.

1. **COTENANCY—Action to Recover Possession.**—A cotenant or joint owner of personal property cannot maintain an action against

the other tenant or owner to recover the exclusive possession thereof, except when the property is destroyed, carried beyond the limits of the state, or when, being of a perishable nature, such disposition of it is to be made as to prevent the other from recovering it, and it is not sufficient that defendant forcibly took the property from his cotenant's possession. (N. C.) *Thompson v. Silverthorne*, 727.

Ouster and Adverse Possession.

2. **COTENANCY—Adverse Possession.**—Tenants in common hold their estates by several and distinct titles, but by unity of possession, and an entry by one inures to the benefit of all, not only as concerns themselves, but also as to strangers. (N. C.) *Dobbins v. Dobbins*, 682.

3. **COTENANCY—Ouster—Adverse Possession.**—There may be an entry or possession of one cotenant amounting to an actual ouster so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and the putting him out of the seisin, and such an actual ouster followed by possession for the requisite time will bar the cotenant's entry. (N. C.) *Dobbins v. Dobbins*, 682.

4. **COTENANCY.**—Ouster is a disseisin by one cotenant of his cotenant, the taking of possession by one and holding it against the other by an act or series of acts which indicate a decisive intent and purpose to occupy the premises exclusively and in denial of the rights of all others. (N. C.) *Dobbins v. Dobbins*, 682.

5. **COTENANCY—Ouster—Adverse Possession.**—An exclusive, quiet, and peaceable possession by a tenant in common and those under whom he claims for more than twenty years raises a legal presumption of an actual ouster of the other cotenant's possession, not at the end of the period, but at its beginning, and that the subsequent possession was adverse to the cotenants who were out of possession, which defeats their right to partition or to bring an action in ejectment. (N. C.) *Dobbins v. Dobbins*, 682.

6. **COTENANCY—Ouster—Adverse Possession.**—Disability of a cotenant during the period of more than twenty years, when the possession is quietly and exclusively held by his cotenant, and those under whom he claims, cannot be permitted to rebut the presumption of law as to an ouster of the former, when the possession commenced in the lifetime of their ancestor from whom they claim, and who was at the time under no disability. (N. C.) *Dobbins v. Dobbins*, 682.

See Partition.

TITLE OF STATUTE.

See Statutes.

TORTS.

1. **TORTS—Unintentional Injury.**—No one is liable, civilly or criminally, for an unintentional consequential injury which results from a lawful act, where neither negligence nor folly can be imputed to him; and the burden of proving negligence or folly, where the act is lawful, is always upon the plaintiff. In other words, the foundation of the defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making a

mistake which an ordinarily prudent man would exercise under the same or similar circumstances. (Ky.) *Crabtree v. Dawson*, 243.

2. **TORT—Release of One of Two Wrongdoers.**—If A. lets his horse to B, who is a livery-stable keeper, and B hires the animal to C., whose alleged negligence causes its death, whereupon A. demands a settlement from both B and C., and B., acknowledging his liability, pays A. the value of the horse and takes an assignment of A.'s supposed cause of action against C., B. cannot maintain an action against C. for the tort, since A., having been paid and satisfied by B. has no cause of action which he himself could assert against C., and therefore his assignee can have none. (Mont.) *Tanner v. Bowen*, 529.

TRESPASSERS.

See Negligence, 3, 4; Railroads, 2.

TRIAL.

Reading Law Books to Jury.

1. **TRIAL—Reading Law Books to Jury.**—The practice of counsel to request and of trial judges to read to juries passages from opinions is unwise, and usually improper if it goes beyond a mere statement of a rule of law. (Wis.) *Bowe v. Gage*, 1010.

Instructions.

2. **TRIAL—Instructions.**—A party desiring more definite instructions must make a special request for them. (N. C.) *Ives v. Atlantic etc. B. R. Co.* 732.

3. **TRIAL—Construction of Instructions.**—A charge to the jury that if they find that the accused or any other witness has willfully and corruptly testified falsely to any fact material to the issue, they have the right to entirely disregard his testimony, except in so far as it is corroborated by other evidence of facts and circumstances in evidence, is not susceptible of the construction that the jury may disregard the testimony of the defendant if some other witness has testified falsely. (Ill.) *Aldrich v. People*, 166.

4. **TRIAL—Instructions.**—An excerpt from a charge to the jury must be construed with the context and in connection with the whole charge. (N. C.) *State v. Lilliston*, 705.

Reopening Cause.

5. **PRACTICE.—Whether a Court Will Reopen a Cause** for the introduction of further evidence after both parties have announced the evidence closed, and while the motion for the direction of the verdict is being argued, rests in the discretion of the court. (Ga.) *Bridger v. Exchange Bank*, 118.

6. **PRACTICE—Partial Reopening of a Cause.**—The Court may Permit the Reopening of a Cause to allow evidence to be offered on a particular point without being compelled to reopen it for the general introduction of evidence. (Ga.) *Bridger v. Exchange Bank*, 118.

TROVER AND CONVERSION.

1. **TROVER AND CONVERSION—Second Mortgage of Chattels.** If a person first gives a mortgage on chattels to one who does not record it, and then gives another mortgage on the same chattels to a

person who records it, the giving of the second mortgage is an illegal and unauthorized exercise of dominion over the chattel, inconsistent with, and detrimental to, the rights of the first mortgagee and constitutes a conversion of such chattels by the mortgagor without any manual transfer of the property. (Me.) *Ivers & Pond Piano Co. v. Allen*, 307.

2. **CONVERSION—Remedies.**—An owner may maintain an action of tort to recover damages for the conversion of his property, or he may treat the conversion as a sale and bring indebitatus assumpsit for its value. (Va.) *Tidewater Quarry Co. v. Scott*, 864.

See *Executors and Administrators*, 12, 13.

TRUSTS.

Creation of Trust.

1. **TRUST IN PAROL.**—A valid express trust involving real estate, enforceable in equity, can be created by parol. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

2. **TRUST, When Created.**—If a conveyance is executed, accompanied by a parol agreement, that the grantee will hold the property for the use of the grantor and convey the title as he may direct, no consideration being paid for the conveyance to him, a valid parol trust is thereby created in favor of the grantor, enforceable in equity, though his object in making the conveyance and executing the agreement was to hinder, delay and defraud his creditors. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

3. **TRUST, When not Created.**—The legal owner of property is prima facie entitled to its beneficial enjoyment, and to convert him into a trustee, there must be a sufficient indication of the intention of the parties that he is to hold for the benefit of others. (Md.) *Doan v. Ascension Parish*, 379.

4. **A TRUST cannot Exist** when the same person possesses both the legal title and the right to the beneficial enjoyment. (Md.) *Doan v. Ascension Parish*, 379.

5. **TRUST, When not Created by Devise to the Vestry of a Church.** A devise to the vestry of Ascension Church to be used for such church purposes as the rector of the church may direct, accompanied by a statement that it is the purpose and desire of the testator that the property shall be under the control of the rector of the church and be used for such work as he may deem best for the interest of the church, does not create a trust, for the reason that the devise gives both the legal title and the beneficial interest in the property to the vestry of the church, to be used for its corporate purposes. The power given to the rector is a naked collateral power, repugnant to the fees devested to the vestry, and therefore void. (Md.) *Doan v. Ascension Parish*, 379.

Note.

Trusts, confidential relations as tending to create, 791.

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- constructive in favor of client against attorney, 795.
- constructive in favor of one cotenant against another, 796.
- constructive in favor of debtor against creditor or vice versa, 796, 797.
- constructive in favor of husband against wife or vice versa, 792.
- constructive in favor of one partner against another, 795.
- constructive in favor of parent against child or vice versa, 793.
- constructive in favor of parishioner against priest, 795.
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- constructive in favor of ward against guardian, 795.
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- oral, states recognizing, 785, 786.
- oral, the parties may respect, 783.
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- writing, states not requiring creation of by, 784.
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- writing to create, may consist of several writings, 781.
- writing to create, need not be contemporaneous, 780.
- writing to create, pleadings may constitute, 781.
- writing, when essential to creation of, 776.

Married Woman as Trustee.

6. **TRUSTEE, Married Woman, as.**—By the common law, a married woman had the capacity to take and hold lands as trustee and to execute the powers and duties of the trust, including that of conveying the trust property by deed without the concurrence and joinder of her husband. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

7. **TRUST.**—A Married Woman may be a Trustee for Her Husband and may execute the trust by conveying the property to him by a conveyance in which he does not join. (Tenn.) *Insurance Co. of Tennessee v. Waller*, 763.

Purchase by Trustee.

8. **TRUSTEES—Purchase by.**—Although, as a general rule, a trustee cannot buy from the beneficiary, yet an exception exists when there is a distinct and clear contract executed after a jealous and scrupulous examination of all the circumstances and proof that the beneficiary intended the trustee to buy, and there is a fair consideration, no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in his character as such. (Ark.) *Reeder v. Meredith*, 22.

9. **TRUSTEES—Purchase by—Burden of Proof.**—A trustee who purchases property from his beneficiary has the burden of proof to show the utmost good faith in the transaction. (Ark.) *Reeder v. Meredith*, 22.

VENDOR AND VENDEE.

VENDOR AND PURCHASER, Trust Against the Latter in Favor of the Former.—If one in the possession of real property contracts to sell to another all the timber he may remove therefrom before a date specified, and he enters under such contract and commences cutting the timber, he stands in the position of a vendee of land, and cannot disavow the vendor's title nor acquire title in hostility thereto, and if he purchases a paramount outstanding title, he acquires it in trust for his vendor, and will be compelled to convey it on the payment of the amount expended in its acquisition. (Mich.) *Petroski v. Minzgoehr*, 450.

See Injunction.

WATERS AND WATERCOURSES.

1. **WATERS—Riparian Rights.**—An owner of land is entitled to have the water enter and leave his premises in the natural and ordinary way and at all times. This rule applies to high as well as to low water. (Mich.) *Allen v. Thornapple Electric Company*, 453.

2. **WATERS—Dams Backing up on Lands of Riparian Proprietor in Times of Freshets.**—A lower riparian proprietor has no right to maintain a dam which will back water upon the upper riparian proprietor's lands in time of freshets or prevent its flowing therefrom to his injury, though at ordinary stages of water such dam will not occasion any injury. (Mich.) *Allen v. Thornapple Electric Co.*, 453.

3. **WATERS, Dams, Remedy for Maintenance of to the Injury of the Upper Proprietor.**—If a dam has been maintained in a stream to the injury of an upper riparian proprietor in times of freshet, he is entitled to a judgment reducing the height of the dam so that it will

not inflict such an injury and awarding him compensation for the damages previously suffered. (Mich.) *Allen v. Thornapple Electric Co.*, 453.

WEAPONS.

CONSTITUTIONAL LAW—Right to Bear Arms.—A constitutional provision that people have the right to bear arms for their defense and security applies only to the right to bear arms as a member of the state militia, or some other military organization provided by law, and does not prevent the enactment of a valid law prohibiting and punishing the carrying of arms or deadly weapons by private individuals. (Kan.) *City of Salina v. Blaksley*, 196.

WILLS.

In General.

1. **CORPORATIONS, Devise to.**—The Misnomer of a Corporation will not defeat a devise or bequest to it if its identity is otherwise sufficiently established. (Md.) *Doan v. Ascension Parish*, 379.

2. **WILL—Extrinsic Evidence to Vary Trust.**—Where a testator has directed the share of his son to be paid to a trustee, to be used for the benefit of the son, but not to be paid into his hands, extrinsic evidence is not admissible to show that the testator's reason for creating the trust was the incapacity of the son because of disease, that since the death of the testator the son has so far recovered his health as to be able to manage his estate, and that therefore its possession and control should be given to him. (Ky.) *Carpenter v. Carpenter's Trustee*, 275.

3. **WILLS, Property Given to Heirs by, When Deemed to be Personal Property.**—A devise of real property to be converted into money and the money to be distributed among the devisees is to be treated as a devise of money and not as of land, though the devisees may, by their unanimous concurrence, elect to take land instead of money. (Ill.) *Darst v. Swearingen*, 152.

4. **WILLS, Property Given to Heirs When Deemed to be Vested in Them by Descent.**—A devise giving the devisee precisely the same estate and interest in the property as he would have taken by descent is void, for the reason that title by descent is regarded as worthier and better than title by purchase. (Ill.) *Darst v. Swearingen*, 152.

5. **WILLS—Devise to Heirs, When Does not Vest in Them by Descent.**—If a devise is made by the testator's heirs and there is a difference in kind or quality of the estate or property to be passed under the devise from that which would descend to them by the statute, they must be held to take by devise and not by descent. (Ill.) *Darst v. Swearingen*, 152.

6. **WILLS—Rights of Devisee—Subsequent Encumbrance.**—A devisee of real estate, encumbered by the testator subsequently to the execution of the will, has a right to have the encumbrance discharged out of the personal estate of the testator, where the will directs the payment of all of his debts from any ready money or other personal property that he may have at the time of his death. (Va.) *French v. Vradenburg*, 838.

7. **DEVISE to Two and Their Heirs, Construction of.**—If property is devised to two nieces of the testator, to have the use and

benefit of property, half to each for and during their natural lives, and then to their respective heirs, to have their own half, and if either of the heirs dies without children, her share to go to the survivor or the surviving children, the children of neither has any vested interest in the property. If one should die without children, her share will go to the surviving niece. If the other should die leaving children, her interest will go to her children. If one should die without children after the death of the other who had died leaving children, the share of the one dying without children would go to the surviving children of the other. (Tenn.) *Rutherford v. Rutherford*, 799.

8. WILLS—Devises—Rule in Shelley's Case.—If a testator devises to his devisee "the use, benefit and profit" of his land during her natural life and to the lawful heirs of her body after her death, this is sufficient to pass an estate in the land, and the rule of "Shelley's Case" applies. (N. C.) *Ferry v. Hackney*, 741.

Pretermitted Child.

9. WILLS—Omitted Child—Evidence—Burden of Proof.—Under a statute providing that "when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate," parol evidence is admissible to show whether such omission was unintentional, and the burden is on the pretermitted child to establish such fact. (Neb.) *Brown v. Brown*, 568.

Probate and Contests.

10. WILLS, PROBATE OF—Conclusiveness as to Mental Capacity.—The decree of the proper court admitting a will to probate is conclusive on all parties as to its due execution and as to all questions affecting the competency of the testator to make a will. (Neb.) *Brown v. Brown*, 568.

11. WILL CONTEST—Attorneys' Fees.—Under the statute of Wisconsin providing that "any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may allow to the contestant, if successful in the circuit court; a reasonable attorney's fee out of said estate for services in such contest in said circuit court," the first court mentioned refers to the one having primary jurisdiction of the probate of wills—the county court—as having authority to allow attorney fees. (Wis.) *In re Gertsen's Will*, 1060.

Foreign Wills.

12. FOREIGN WILL.—When a Will has Been Regularly Probated in the state of the domicile of the testator by a court of competent jurisdiction, a court of another state wherein the deceased left property cannot refuse the will probate, because some of the essentials of a valid original probate in the latter state are wanting, if the statutes of that state declare that "the will shall have the same force and effect as if it had been originally proved and allowed in the same court." (Wis.) *In re Gertsen's Will*, 1060.

13. FOREIGN WILL—Contest of Application to Probate.—While the statutes of Montana do not in express terms provide for the contest of an application to the courts of that state for the probate of a foreign will, they do so impliedly, for section 2351 of the Code of

Civil Procedure, which has to do with the subject, provides for a hearing of such application and for notice thereof. (Mont.) State v. District Court, 510.

14. FOREIGN WILL—Contest of Application to Probate.—While no particular grounds of contesting an application for the probate of a foreign will are expressly designated by the Montana statutes, section 2352 of the Code of Civil Procedure does enumerate the findings which the trial court must make before admitting such will to probate, and these may be accepted as questions with respect to which issues may be raised, and therefore the grounds for such contest. (Mont.) State v. District Court, 510.

15. PROBATE OF WILL.—A Judgment in a Probate Proceeding is a judgment in rem; that is, it determines the status of the subject matter. Therefore, the judgment of a court admitting a will to probate fixes the status of the instrument as a will, and becomes at once conclusive upon the world of all the facts necessary to the establishment of a will, among which are, that at the time the will was executed the testator was of sound and disposing mind, and was not acting under duress, fraud, or undue influence. (Mont.) State v. District Court, 510.

16. FOREIGN WILL.—To Entitle a Foreign Will to Probate here, it must appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes. (Mont.) State v. District Court, 510.

17. FOREIGN WILL.—Conclusiveness of Probate.—A will executed in California by a testator there residing, and subsequently admitted to probate in that state, may not, when afterward admitted to ancillary probate in Montana, where the testator left real and personal property, be contested on the ground that the testator was not of sound and disposing mind, or acted under duress, fraud, or undue influence, the Montana statutes providing that when such foreign will is admitted to probate in this state it shall "have the same force and effect as a will first admitted to probate in this state." (Mont.) State v. District Court, 510.

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WITNESSES.

WITNESSES—Credibility of Question for Jury.—If there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always an open question for the jury, and this is so though the testimony may be all one side and all tend one way, and in this event the judge may charge the jury if they find the facts to be as testified by the witnesses, to answer the issue in a certain way, but not, upon the evidence, so to answer it, as by such charge he passes upon the credibility of the witnesses. (N. C.) *Dobbins v. Dobbins*, 682.

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